









**TAGORE LAW LECTURES—1914.**

PRINCIPLES

OF THE

# Law of Corporations

WITH

*SPECIAL REFERENCE TO BRITISH INDIA.*

BY

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"Le droit n'est pas un musée d'art,  
mais une représentation de la vie"

—Saleilles.

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**IN MEMORIAM**

**A. T. M.**

**Auctor**



## FOREWORD

Although these lectures have been 'unconscionably long' in passing through the press, nothing has happened in the intervening period to necessitate a change in the views expressed in them—the Great War notwithstanding. The object of the course, as indicated in the Introductory Lecture has been mainly the discussion of the theory and not the practice of the Law of Corporations, the practical aspect is considered as a test of the theory; for the jurist should always bear in mind the mephistophelian warning—"Grau, teurer Freund, ist alle Theorie, Und grün des Lebens goldner Baum—"

My lasting regret is that the book did not come out in the life-time of its intellectual sponsor—the late Sir Asutosh Mukerjee. It is now a poor consolation to dedicate it to his memory. Would that it had been worthy of being placed in his hands.

I must express my gratitude to one of my colleagues—Professor Asutosh Mukerjee M.A., B.L., for correcting the proof. A list of important sources is given below.

*AUTHOR.*

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## ERRATA.

| Page  | Line      | For  | Read   |
|-------|-----------|--|--|
| 8     | 22-23     | 'The agrimensores publicae personae'                   | 'The agrimensores and the colonies were, according to Savigny, publicae personae.'                 |
| 46    | foot-note | 'Juridical person for purposes'                        | 'juridical person for all purposes.'   |
| 47    | 8         | 'too much sebaît'                                      | 'too much real sebaits.'   |
| 63    | 6-7       | 'which the shares etc.'                                | 'while the shares etc.'  |
| 84    | 25        | 'take occount of'                                      | 'taken account of.'  |
| 90    | 6         | 'do not disturb'                                       | 'did not disturb.'   |
| 126   | 20        | 'to such a group, the various types of fiction-theory' | 'to such a group,—the various types of fiction-theory.'  |
| 185   | 16        | 'weich is supposed etc.'                               | 'it is supposed etc.'  |
| 186   | 18        | 'this doctrine as led etc'                             | 'the doctrine has led etc.'  |
| ..    | 20        | 'in its abridgement'                                   | 'in his Abridgement.'  |
| 189   | 5         | 'from legal facts etc.'                                | 'when legal facts etc.'  |
| ..    | 12-16     | 'They..... ..creation'                                 | 'They.....royal charters. Coupled with the matters of fact.....intentionality in legal creations.' |
| 18-23 |           | 'This almost.....corporateness'                        | as two sentences, 'This... ..in the theory' and 'Certain associations... ..corporateness.'         |

# PRINCIPLES

OF THE

# LAW OF CORPORATIONS.

## INTRODUCTION.

THIS COURSE, as the title indicates, deals mainly with the principles of the law of corporations with special reference to India. The details are, more or less, avoided as not coming within the scope of lectures designed to be general in character. 'The place of corporation in jurisprudence has been examined and Indian cases, when they illustrate any fundamental principle, have been discussed.

Scope and  
object.

The law of corporations has many surprises for a practical lawyer who lets 'jurisprudence stink in his nostrils.' (1) The entity whose rights and duties are to be discussed is 'imperceptible to any of the senses, has men for visible organs, may have the will and passions of men attributed to it.' (2) For understanding the nature of such an abstraction, it is necessary

Law of cor-  
porations.

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(1) Dicey quoted by Prof. Gray on page 5 of the Nature and Sources of the Law.

(2) Gray, *Ibid*, p. 48.

to discuss the rise and development of the doctrine of juristic personality.

Person and  
personality.

In his famous treatise, *Natürliche und juristische Personen*, Hölder (1) remarks that there is an intimate connection between the two terms person and personality—the two important factors of universal jurisprudence. Das zweite Wort bezeichnet eine Eigenschaft, das erste ein Ding, das jene Eigenschaft hat. There is, in fact, a reciprocal relationship between the two, because there is no person without a personality and no personality without a person. This apparent truism is fraught with a deep signification which, had it been properly appreciated, would have saved the jurist much quibble in connection with the fundamental question about a juristic person.—Is it a *persona ficta* or is it a *persona vera*? A mass of continental legal speculation as Maitland (2) has shown is due to the forgetfulness of the simple observation of Hölder and Binder.

Person.

A person in law is, according to Gierke's famous definition, a right-and-duty-bearing unit. (3) Some jurists, however, dispense with the conjunction of right and duty asserting that a subject of right alone or a subject of

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(1) E. Hölder. *Natür. u. juris. Personen*. I. Die Persönlichkeit im allgemeinen. pp. 1 to 42.

(2) *Moral Personality and Legal Personality* (Sidgwick memorial lecture.) Maitland—Gierke. *Political theories of the Middle Age* Introduction.

(3) Gierke. *Deutsches Privatrecht*, Vol. I, pp. 251 to 26.

duty alone is a person. (1) The facts of law do not justify this dissociation. To take a patent example, the slaves of Roman law although duty-bearing were, as Buckland has conclusively shown, (2) relegated to the position of *res*. The majority of modern jurists, Meurer, Michoud and Pollock among them, define a person as a subject of both rights *and* duties.

There are two classes of persons: (a) natural persons, *viz.*, human beings, (b) juristic persons, *viz.*, non-human beings. Both the classes should satisfy the test of Maitland that if a 'legal statement is made about X and Y' it will in general hold whether these symbols stand for two human beings or two non-human beings or a human being and a non-human being respectively. Thus X may buy land from Y whether X stands for the Calcutta University and Y for the Calcutta Municipality or X stands for an isolated individual and Y for a group like a trading corporation. A court of law must treat this transaction as if it took place between two units. (3)

Human beings may, as subjects of rights and duties, be normal or abnormal, physically capable or incapable. All the physical attributes of an individual need not be present. A human being is a person not because he is

Classes of persons.

Human beings as persons.

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(1) Gray. The nature and sources of the Law, p. 27.

(2) Roman Law of Slavery, Ch. I.

(3) Maitland *loc. cit. supra*.

human but because as a human centre of interest rights and duties may be assigned to him ; (1) consequently the will that characterises a legal person is not necessarily the individual mentality of a human being but it is the intention-generating will Gierke. Some jurists, however, who are rather metaphysically inclined, *e.g.*, Meurer, Zitelmann and Hegel, taking the absolute personality as a model, have sought to discover real, individual will even where it is absent. But Michoud, (2) Maitland and Gierke agree in the view that the abysmal depths metaphysical personality have nothing to do with legal personality. True, the law works with symbols but these symbols are nothing but symbols—short-hand names for legal phenomena—chosen without any reference to metaphysical necessity.

Legal Personality and some modern jurists.

Savigny and Thibaut.

The assimilation of personality to the group of physical attributes present in individual human beings has been a fruitful source of error among some of the modern jurists. Not only the theoretical discussions of Savigny and Thibaut have been affected by this wrong procedure but to this are due some untoward practical consequences of the pre-revolutionary French Law. Ducrocq remarks in his *Cours de Droit Administratif* that the insistence on the presence of a real will and

(1) Pollock First Book of Jurisprudence. Binder Das Problem der jurist. Person, pp. 8 to 11.

(2) La Théorie de La Personnalité Morale, p. 13.

the forgetfulness that the idea of personality is a technical, relative idea led to the revolutionary assemblies to adopt a regrettable procedure with regard to state-owned property. Even so late as 1905, the French chamber (1), in the sitting of March 7, made some curious blunders while discussing the liabilities of Municipal bodies.

Personality, even of normal human beings, is relative and not absolute. So Michoud says 'Notre theorie ne sera donc pas *absolute*. Si nous arrivons à conclure que la notion de personnalité juridique est assez large pour comprendre certains groupes humains, nous n'affirmerons pas par là même que ces groupes ne peuvent pas vivre sous un autre regime que celui de la personnalité. (2) The characteristics of a person would depend on the choice that law makes of the subject of rights and duties. And different systems of law have not always selected the same instruments for carrying out the same purposes. Any theory of personality must not overlook this general fact.

Personality  
a relative  
characteristic.

Non-human beings may be animate or inanimate. The animate non-human beings, e. g., animals, are not regarded as persons in modern law. Thus *In re Dean, Cooper-Dean v. Stevens* (41 Ch. D. 553) clearly shows that

Non-human  
beings

(1) GénY Méthode en droit No. 61.

(2) Loc. cit., p. 11.



although a trust for the benefit of particular classes of animals is valid yet it is enforceable as a public and charitable trust and not as a trust of which the animals are cestuis que trust like the ordinary human beneficiaries of a trust. The duties towards animals are conceived in English law as duties towards society itself. The animals having no rights and no duties are not persons in law. In ancient law there are indications which at first sight point to a contrary direction. In Exodus XXI, 28, one reads 'If an ox gore a man or a woman that they die then the ox shall be surely stoned and his flesh shall not be eaten.' Plato in his laws mentions provisions of a similar nature. These examples have led some to think that the animals were subjects of a legal duty and as such, at least quasi-persons. But Holmes and Osenbrüggen have satisfactorily explained the position of animals in ancient law without appealing to the conception of personality.

Inanimate  
beings.

Inanimate beings have figured as person in ancient as well as in modern law. The *res sanctae* in Rome, the church-buildings in the Middle Ages had rights and duties appertaining to them. They could take under a will. Austin thinks that the *praedium dominans* like the *res sanctae* was invested with personality. But Buckland (1) says in his *Elementary Principles of Roman Law*

(1) Loc. Cit. p. 57.

"Nowhere in the extant writings of the Roman jurists is a *praedium dominans* regarded as a person." \* Besides this doubtful instance, there are groups of objects and masses of rights and duties like *Hereditas jacens*, the Bankrupt's estate, which are true examples of inanimate objects and even notional objects appearing as right-and-duty bearing entities.

Of all the non-human legal persons the most important is a corporation. When 'n persons,' says Prof. Maitland, 'unite together for the purpose of acting in concert, jurisprudence, unless it wishes to pulverise the group, must see (n+1) persons.' This (n+1)<sup>th</sup> person has variously been called a juristic person, a fictitious person, an artificial person, a moral person. Of these terms the first is the least objectionable. The epithets artificial and fictitious beg the question regarding the nature of personality of a group-person. The epithet moral has been rejected by Savigny (1) on account of its ethical suggestion.

Corporation  
as a person.

As jurists are unanimous in the opinion that the doctrine of corporations that obtains in the modern world is the one derived from the *corpus juris*, a short account of this doctrine and of the various juristic persons of Roman law will form the proper starting point for any discussion of the principles of corporation law.

Juristic persons and  
Roman Law.

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(1) Savigny. Rom. Recht, § 85.

The principal classes of juristic persons in Roman law were :—

1. The communes.

These had a communal unity. They were the results of the Roman system of territorial organisation. All the provinces were regarded as states under the suzerainty of Rome. The Digest (1) talks of the *civitas* and the *municipes*. The *Res Publica* is found in later law to denote the Roman republic. All the *Municipes* as modelled on the State had, like the latter, a personality distinct from that of the individual citizens.

The *curiæ* or the *decuriones* figured as juristic persons as Ulpian has repeatedly mentioned. Paulus says that certain localities on account of their extent and importance occupy a position intermediate between a villa and a village. These are *fora*, *conciliabula*, *castella*. They may be regarded as entities having corporative rights. (2) The *agrimensores* according to Savigny called the provinces and the colonies *publicae personae*—an expression which indicates the recognition of their personality by Roman law. (3)

2. Voluntary associations.

(a) Religious associations, *viz.*, the college of the pontiffs, the Vestals, figured very early as bodies having rights and duties separate

(1) Mommsen. Digest. De. Civit.

(2) Savigny. Rom. Recht.

(3) Ibid.

from those of the constitutive elements. Dirksen. gives an example of a Roman fideicommissum where money was left to a priestly brotherhood. The terms were : MM. Sol. reddas *collegio cujusdam templi* quaesitum est cum id collegium postea dissolutum sit, etc.

(b) Association of state officers. The officers of the state, the magistrates, the scribes, analogous to the notaries of modern law, formed themselves into corporations. At Rome and at Constantinople the corporations of the scribes had rights and privileges peculiarly their own. Thus Cicero, in an epistle to his brother Quintus, and Tacitus in the annals refer to the corporations of the scribes.

(c) Trade gilds. Niebuhr mentions that early in Roman history the gilds were regarded as corporations with capacity to possess. Dirksen and Eichhorn, as quoted by Savigny, support Niebuhr's statement. The artisans, the bakers, the builders formed themselves into gilds.

(d) Friendly Associations. The Digest mentions sodalitates, the *collegia sodalitia*. Cicero quotes Cato who says that friendly unions were common in his time. They were like the clubs and unions of modern times. The *sodalitia*, however, held property and had corporative power. The *collegia tenuiorum* of later dates were descendants of the earlier *sodalitia*.

### 3. Charitable and religious endowments.

Under the Christian emperors religious endowments called donations *super piis causis factæ* were common. Although the sources have no generic expression for these establishments yet the legal incidents leave no doubt that the *pia corpora* were juristic persons. In fact, as the Codex of Justinian shows, the churches could take property under a will. Not only had a religious foundation the power of possessing property, but it could also be instituted as a *heres*.

### 4. The treasury.

The treasury of the emperor called the *fiscus*, as distinguished from that of the senate called the *aerarium*, was a juristic person. These four classes are noticed in the Digest as juristic persons. The question how did the Romans consider the personality of group-persons deserves some attention.

The Roman lawyers admitted the existence of civil personality, as is evidenced by the fact that the two distinct currents that have flown from the Romanists—the medieval current dating from the time of the Canonists and Glossators, and the modern current due to Savigny—bear unmistakable traces of a common origin, *viz.*, the writings of the *jurisconsults*.

Rise and development of the theory of juristic personality in Rome.

Prof. Saleilles' account summarised.

In Roman law, as in all modern laws, there are two view-points whence to consider

juristic personality :—(i) the view-point of public law, and (ii) the view-point of private law. The question regarding the conditions of the existence and legality of a group-person is purely a question of public law. It is a matter which appertains to *jus publicum*. Once the right to existence has been determined, the association being supposed to be lawful, the next point to consider is the juridical capacity of the group. Will the association be regarded as a subject of rights and duties? Will it have the power to contract? The answers to these questions will settle the juridical capacity of the group, that is to say, the juridical personality of the association. Now, the *jus privatum* is mainly concerned with questions of this nature.

It is to be noticed that by juridical capacity is understood not only the power to enjoy rights but also that of exercising the rights, e. g., what will be the essential conditions for binding a corporation by an act of an individual corporator? Who will have the power to act in the name and on behalf of the corporation? These two powers, united in the civil capacity, have been distinguished by the German writers as the *Rechtsfähigkeit* or the capacity relative to the possession and enjoyment of rights and *Handlungsfähigkeit* or capacity for exercising those rights.

Juridical  
capacity.

These two points of view were in Roman

Associations  
in Rome.

law distinctly recognised as is evidenced by the passages in the Digest where there are references to the law of foundations and associations. The question whether a collegium or a corpus whatever had a right to exist, in other words whether it was lawful or not, was to be determined by the *jus publicum*. But the civil capacity of the same collegium, its power to buy land, for instance, was a matter for private law. Here, however, it may be noticed that even for some time after the law regarding corporations had taken a definite shape the association could exercise patrimonial rights only under special sanction of the state. The progress of this conquest by the public law of the domain of private law was checked when it became fully established that a *collegium* resembled a *civitas* with this difference that for certain *collegia* the rules of its *jus sacrum* prevailed over the rules of *jus publicum*. The jurisconsults of the third century A. D. recognise a clear distinction between the legality of existence of and the capacity of juristic acts by the associations. The first is a question for *jus publicum*, the second for *jus privatum*.

A collegium  
a persona  
incerta.

The *collegia* were invested with personality in order that they might have civil capacity. They had originally all the rights of an individual legal person except the right to be instituted legatees by a will. This

incapacity was due to the fact that to the Roman eye personality of a corporation never ceased to be an abstraction. A testator was never allowed to institute an abstract entity. *A universitas* was an abstract entity—a *persona incerta*. The testator might have known all the individuals composing the corporation, yet the corporation itself was unknown to him and unknowable in essence. It was a figment of the mind and could not be instituted by a testament. A legacy to an uncertain person was void.

But this juridical subtlety was met by a subtle device. It was admitted that an individual might have a real affection for a group of persons regarded as a corporate unit. One loves one's village, one's city, as much as one's friend. The city or the village was individualised in a certain sense. Once individualisation through affection was allowed, the *incerta persona*, the *universitas* became a *certa persona*. A legacy made to such a one was then valid. A *universitas* was thus converted into a *certa persona* just as a city and in the same sense.

The difficulty  
overcome.

So much for the two characteristics of a juristic person--the *Rechtsfähigkeit* and the *Handlungsfähigkeit* of Neubecker. But for a proper comprehension of the subsequent development of the theory of corporations in Roman Law, it is necessary to pass under



review the history of the group-persons noticed in the Digest.

Stages in the  
history of  
corporations  
in Rome.

The history of the associations, guilds and other corporations, from the point of view of public law may be divided into three periods. The first period extends from the establishment of the republic to the time of Cicero. During this period law allowed perfect freedom in regard to the power to associate. No laws were passed during the republic prohibiting individuals from forming associations at their pleasure. No previous authorisation by the State was necessary. The fragment from the Digest 4.47.22—*His autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant.* (They might constitute to themselves any power they liked by *lex pactionis*, i.e., by special contract, provided they *did not violate the public law*)—is sometimes quoted to support a contrary view. But, as Neubecker (1) explains, the text only indicates that, the Senate had the power of examining the bye-laws of the association and dissolving the association if the bye-laws contemplated infraction of the state laws. In other words whenever the object of an association appeared contrary to public policy the association was declared illegal. This apparently presupposes the existence of an association. The Senate

First stage.

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(1) *Vereine O. Recht.*, page 64. *Saleilles loc. cit.*, p. 58.

was asked to interfere only when the bye-laws of an association were a menace to the state.

Under the regime of liberty, associations and guilds were fairly numerous. Many of these had become historic by the time of Cicero. The *collegia tenuiorum* helped the poor artisans to meet the funeral expenses, the *collegia sodalitia* looked to the needs of the soldier members of the guild. The petty associations, with the growth in their number and activity, threatened rivalry with the State. The Senate was alarmed and after the famous Catiline conspiracy, in which some of the trade guilds took part, Cicero obtained a *senatus consultum* which suppressed all the semi-political associations and guilds. This rigorous measure led to a strong resistance from many a corporation, then grown popular, with the consequence that, when Clodius became a tribune, a *Lex Clodia de collegiis* was passed re-establishing some of the dissolved *collegia*. But this *Lex Clodia* had a very short term of existence, because when Julius Cæsar assumed the supreme power a law was passed—a *lex Julia*—which according to Suetonius (1) suppressed all the *collegia* except a few which dated from a very old time. The second stage of the history of Roman corporations ended

Second stage.

(1) Suetonius, Div. Julius—"Cuncta *collegia præter antiquitus constituta distraxit*" quoted by *saleilles* p. 61.

with a policy of restriction following a policy of liberty.

Third Stage.

The third period begins with Augustus. He went beyond Cæsar by laying down a new condition for incorporating an association. Before a gild became a gild it had to be authorised by the Senate to act as a person. This new enactment checked the multiplication of corporations. That it had this desired effect is evidenced by two important texts cited by Gierke and Waltzing. The first is the text attributed to Marcian in the Digest (XXXXVII, 22, 1) *Mandatis principalibus præcipitur præsidibus provinciarum ne patiantur esse collegia sodalicia neve miles collegia in castris habeant. Setd permittitur tenuioribus stipem menstruam conferre.....* The second is an inscription of the funeral gild of Lanuvium mentioned by Girard in his texts of Roman Law. This runs as follows:—*Kaput ex Senatus-consulto populi romani: quibus coire, convenire collegium que habere liceat.* (1) So the last epoch ended by establishing the superiority of the *jus publicum* over private contract in matters of group-persons. This history has curiously enough repeated itself at least partially in modern law. The French system as well as the English system at one time of its respective history has required state authorisation as a condition precedent to incorporation

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(1) Girard — *Textes du droit Romain*, p. 736.

and before such a rule became general, each system allowed just like the Roman law of classical times free growth of bodies corporate and semi-corporate. (1)

From the standpoint of *jus privatum* the history of the civil capacity of juristic persons divides into two stages. During the first of these, *viz.*, in the pre-Augustan period there were no specific enactments applicable to the guilds or associations. There was no law of corporations enacted for the group-persons and the group-persons alone. They were regulated by the general law of Rome. The XII Tables said, *His autem potestatem facit lex pactionem quam velint sibi ferre dum ne quid ex publica lege corrumpant*. The associations might by a pact bind the associators in any way they liked provided the pacts of the associations were not themselves illegal. It follows that the jural capacity of the corporations was determined by the 'common law,' to use a modern term, of the realm—a law that applied to corporators as well as to co-proprietors. Yet it must not be concluded that the collectivities such as the associations, the charitable endowments and guilds of Rome were at the start regarded as mere co-owners. There was some thing more than the undividedness of a joint ownership. Every *collegium* had its

Personality  
of the Uni-  
versitas—*Jus*  
*privatum*  
First period.

(1) Michoud, *loc. cit.* Vol. 2.

(2) Ferrara—*Le persone giuridiche*.

bye-laws, its private statutes—the *lex collegii*—which for the group that subscribed to them formed a veritable law of corporation. The existence of these pact<sup>s</sup> is admitted by the jurists in the Digest. Gaius says, borrowing from Solon : *Quidquid hi disponent ad invicem firmum sit, nisi hoc publicae leges prohibuerint.* (1) This apparently alludes to a reciprocal contract among the associators—the *pros allylons* of Greek has, according to Saleilles, been rendered by *ad invicem* in Latin. (2) Now in virtue of this statutory pact the individual members had to contribute to form a common fund—the *arca communis* of the gild. The *arca communis* or the *pecunia communis*, as some inscriptions have it, was somewhat like the common fund of a modern club or association and so long as the organisation lasted this fund had to remain undivided. The *arca* was perhaps administered by the directors of the association in the name of the associaton ; the individual shares were determined only when the association broke up or when an individual as sociator retired. Thus Marcian in the Digest says that in case an associator joins a new collegium he should receive his share which would come to him on the supposition that the quondam association has been dissolved. (3)

(1) Mommsen Digest 4 (47, 22).

(2) Saleilles. Loc. cit. p. 69.

(3) Dig. I. 2 (47, 22).

The members of a gild were not, therefore, co-owners strictly so called. Marcian himself has laid stress on this fact. In co-ownership the parts of the joint-property are individualised from the very beginning ; while the parts of the common fund of a Roman gild during the pre-Augustan period were not individualised, even ideally, at its inception. The *arca* although it belonged to the gild collectively did not belong to the individuals *ut singuli*. The collegium owned the *pecunia communis* which was a separate mass set apart by the *lex collegii*.

Personality of  
the collegium.

An important point to note is that the common property which the collegium possessed came, as has already been mentioned, from the individual members who were under a special obligation to contribute to the *gild fund*. But the collegium considered as a body made up of a plurality of members could not under the Roman hypothesis acquire by *mancipatio*, *in jure cessio* or even by *traditio* ; because all these demanded that the *animus possidendi* should be directed at one and the same time to the thing to be acquired. This orientation of intention, as a matter of course, was not possible unless the collegium were invested with a personality of its own. So, during the first period, the personality of a group was becoming a juristic necessity and by the end of the second period it was indispensable.

The second  
Stage.

The *collegia*, during the second period of their juristic history were formed on the model of the *civitas*. They were governed by functionaries bearing the titles of magistrates, curators, quaestors. This approximation of the *collegia* to the states and municipalities was due to a rapid development of the idea of juristic personality. The *populus Romanus*—the Roman nation—was a person to the jurists. The state an organ of the *populus Romanus* was also a person. The step from the state to the municipalities and then to the guilds modelled on the municipalities was not very difficult to take. They were all *persons* to the jurists and thus appeared fully formed the important, almost the supreme, conception of Roman Law—the *universitas*. In this connection a passing reference to the texts is helpful.

Universitas.

In the earlier texts the personality of a *universitas* is based on a more or less fictitious assimilation of a group to a human being. The Digest says "A *universitas* is allowed to figure as a person—*Personae vice fungitur* or *Personae vicem sustinet*. This was an image, so to say,—a term of comparison as Michoud would say. But behind the image was hidden a legal conception of high significance, *viz.*, that of the corporative unity revealed by the expression *universitas*. A *universitas* is a name for every organised and

united group. Consequently, the later texts oppose the idea of a unified collectivity—*a universitas*—to the sum of the individuals composing it—*the singuli*. Marcian says about the property of the city : *universitatis sunt, non singulorum*—it belongs to the *universitas* and not to the individuals. Before this new idea arose, the law of group-persons presented frequent anomalies because in transactions affecting the group as a whole exceptions to the general law and exceptions to these exceptions had to be recognised, *e.g.*, the common property of a gild was and was not, according to circumstances, a joint-property. Co-ownership and corporate ownership were confused with each other. But with the appearance of the *universitas* as a person all the anomaly ceased. The  $(n+1)^{th}$  person of Maitland saved the  $n$  persons many a difficult situation. Ulpian found no difficulty in opposing the *universitas* to the *singuli* when he said that the *servus communis* was not the common property of the citizens but he belonged to the city. *Nec singulorum pro parte intellegitur sed universitatis.* (1) So clear is the evidence of the texts on this point that Gierke has stated (2) “there is no doubt that the conception of the juridical personality was fully formed in the post Augustan period.”

(1) Ulpian. Reg.

(2) Gierke Genoss.



New and old  
universitas.

The new conception of the universitas developed, as has already been noted, out of an analogy between the state and the private corporations. The state was something distinct from the *populus Romanus*, so was a gild something distinct from the gildmen. The new conception differed from the old in this that while the old group realised a sort of unity by the individuals acting collectively, the new group was so much of unity, gave birth to such an intensified and exteriorised idea of unity that the group was more or less replaced by the group-person. What was before a question of fact now became a question of law. The property that existed as a distinct fund separated and isolated *de facto* had per force to be regarded *de jure* as distinct because it now belonged to the universitas. This new subject of law had rights of possession and ownership. So was Roman law constrained to modify the theory because facts would not, then as now, tolerate fictions. In the words of Prof. Dicey "when a body of twenty or two thousand or two hundred thousand men bind themselves to act in a particular way for some common purpose, they create a body, which by no fiction of law but by the very nature of things differs from the individuals of whom it is constituted. (1)

(1) Dicey—Sidgwick Memorial Lecture.

The new *universitas* of the Roman law was far from a *persona ficta*.

The Roman *universitas* before it donned its modern dress passed through the Germanic lands. It is instructive to follow its vicissitudes there.

For a long while after the conquest of the south-western Europe, the Germanic tribes did not feel the want of a theory of juristic persons. This, however, was not due to any dearth of collectivities or associations. Even after the recognition of individual and hereditary property, property owned by numerous village-communities was a familiar phenomenon. In the Germanic lands the agrarian village-communities were known as the *Dorfgenossenschaften* or *Markgenossenschaften*. The *Genossenschaft* is untranslatable. It is, as has been remarked by a French jurist, neither a *verein* nor a corporation. A *verein* has ideal aims while a *Genossenschaft* had an economic, though not necessarily lucrative, end in view. It was somewhat like a gild or a professional syndicate formed for safeguarding the interests of the members. These *Genossenschaften*, as embryonic corporations, did not however suggest any theory of juristic persons in the Germany of the Middle Ages.

Corporations  
in German  
law.

Besides the *Genossenschaften* with a solidarity springing out of the communistic interest of the members there were many other non-

Communal  
property.

solidary bodies. These groups originally had nothing in common with the Roman gilds or associations. (See note at the end of the chapter). But gradually they assumed the character of corporations. This was effected through three successive steps noticed by Heusler in his *Institutionem. d. deut. Recht* :—

(1) Communal property passed into the semi-concentrated *gesammte Hand*.

(2) The *gesammte Hand* became unified into the *genossen* property and *genossenschaft* appeared.

(3) The more concentrated *Genossenschaft* emerged as a *körperschaft*—a corporation proper.

*Gesammte  
Hand.*

The joint-family system so common in agricultural communities did not allow the partitioning of ancestral property. The joint owners were the *Meterben*, the co-parceners of modern law. These owners of undivided rights lacked one of the main characteristics of a corporation—that of acting through representatives. In the time of alienation all the co-proprietors had to unite “to put their hands together” as the expression goes. The unity was merged into unanimity. (1) The Germanic *gesammte Hand* was, therefore, inorganic like joint property in general. Co-ownership is not corporate ownership.

*Genossens-  
chaft.*

The jointness, that inevitable mark of communistic property, did not, as already

(1) Saleilles, loc. cit.

noticed, mould the joint owners into associators. Even with its unanimity the group was amorphous. It did not crystallise into a body until the *genossenschaft* arose. The *genossens* or companions to use the approximately equivalent English term had a common purpose in view. Although the individuals are very much to the fore in a *genossenschaft*, yet the fact, that a common object is the impellent motive for each individual acting *quâ* individual, leads to the development of an *esprit de corps*. It is impossible in such a case to deny the existence of a unity—a unity different from unanimity. The *genossens* have a unity of will and a unity of a collective conscience. In the Middle Ages were forming the nuclei of group-bodies destined to play important roles in later times. Even a psychologist of the analytical school, Wundt, allows the *genossenschaft* a *gesamt* will. With so much granted the birth of corporation is inevitable. The *Genossenschaft* develops into a *Körperschaft*. It is, however, a long story.

Even a summary outline of the process of transformation of which Gierke is the historian par excellence would fill a volume. But no attempt is made here to retell what has been fully told in his classical work on the Germanic Corporations. It is, however, necessary to remark that the opponents of the Beseler-Gierke theory of *gesamtwille* are *Körperschaft*.

striving to prove that the distinction between a Genossenschaft and a Körperschaft is one without a difference, holding, as they do, that the two are essentially the same juridical being, the attendant circumstances only make them look different. A Genossenschaft has no money-making interest and hence no question of liquidation arises while a Körperschaft having funds and increase of funds mainly in view is necessarily connected with consequences that pecuniary liability involves. As these consequences perforce differ in different situations, the same institution exhibits varied characteristics. But the man (1) who can say, with perfect justice "It is not probable that for some time to come any one will tread exactly the same road that I have trodden in long years of fatiguing toil" has not put forward a hasty conclusion to be brushed aside as immature. Gierke is not to be trifled with. He is at home in that legal smithy where Baldus and Bartolus, Innocent and Johannes Andreæ were forging tools of great service to the jurists. He has on his side the overwhelming authority of the glossators and the canonists who never tired of declaring that a corporation was not a companionship. Whenever the individuals appeared to have even the smallest share, as individuals, in the rights and duties of the group, the latter was not a corporation.

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(1) Gierke, Genossenschaftsrecht, Intro.

Genossenschaft was not Körperschaft as the individuals in the former did not altogether vanish from the sight of law. It was when the group left behind itself all that was atomistic in its structure that the group-person with a new 'bodiliness' emerged as a corporation.

So much for the evolution of the entity. A short sketch of the evolution of the theory of that entity in Germanic lands will now be attempted.

The doctrine of corporation so far as the Germanic lands are concerned exhibits three distinct stages of evolution. The glossators are at work during the first stage. Their attention is mainly directed to the Roman text already referred to—*Quod universitatis non est singulorum*, whatever belongs to the universitas does not belong to the individuals. The customary law of the Middle Age, however, pointed to an opposite conclusion. Neither the commons in a village nor the common property of a body of persons united together for a common object belonged to a universitas distinct from the collectivity that formed the parish or the association. The glossators having the then features of customary law present to their eyes altered the text into '*quod quæ collegi sunt vel populi vel singulorum*' (1) whatever belonged to the collegium belonged either to the people or to the indivi-

Steps in the evolution of Körperschaft-Theory.

First Phase.

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(1) Gierke—*Genossenschaftsrecht* Vol. III, p. 212.

duals. This view squared with the legal phenomena of the time. The common property of the economic associations owed its existence to individual contributions and it was inequitable to drive out the associates by declaring that the *bourse* belonged to a new person different from those who created it. The facts were thus against the Roman theory. But the prestige of Rome was great and the canonists did not feel quite easy with the glossed law. The second phase of the evolution begins with the canonists.

Second  
phase.

The canonists took their start from *Più corpora* of the Low Empire. The Roman texts had the same word corpus—body—for the charitable endowments as well as the friendly associations.

Now by corpus is represented an idea of organised unity. The group as a group bears rights and duties. "The corporative right absorbs the individual right." (1) Yet the step was not taken so quickly. The group-person, if a subject of law, must have a will so that acts may be attributed to it. In 1245 were put before the Council of Lyon the test questions—Has a collegium a personality that the Pope may touch? Can a corporation be excommunicated? Then came the majestic reply of Pope Innocent IV—a corporation has neither the infirmities of body nor has it a soul—a reply

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(1) O. Mayer—Diejurist, Person.

now vulgarised by the English common lawyers. No soul and therefore none of its perils. It cannot be excommunicated. So commenced the *régime* of *Persona ficta*. A corporation although a subject of corporative rights, if not totally fictitious, is at best a notional being—it has no soul, no conscience no volition.

The notion of personality—the fictitious personality—of a corporation started in the 13th century so far as Germany is concerned, and more than “one generation of investigators had passed away” before it became settled that the ideal being was not after all so much ideal. It was buying and selling, possessing and dispossessing; marry it could not but crime and tort were for it possibilities. With the development of Germanism the Receptionist theory was put into the crucible. Despite Savigny, Beseler gave out “There is no text which *directly* calls a *universitas* a *persona*—a *persona vera* or a *persona ficta* (1). Third phase.

Since then the *Körperschaft* with a *gesamtwille* is enjoying favour in Germany. More than six centuries after Innocent, Gierke says “Our corporation is no fiction, no symbol, no piece of the State’s machinery, no collective name for individuals but a living organism and a real person with body and members and a will of its own. Itself can will, itself can

(1) Maitland—Gierke loc. cit.



act ; it wills and acts by the men who are its organs, as a man wills and acts by brain, mouth and hand."—The idealism of the 13th century gave place to the realism of the 19th. This realism has found followers in England as well.

Corporations  
in France.

Before the study of the evolution of corporations in England is taken up, a glance at a recent chapter of French legal history, even at the risk of anachronism, might prove useful as the modern theory of corporations owes not a little of its development to the controversy that sprang in France out of the campaign against the *congregations*. Michoud's articles and Brissaud's *Manuel d'histoire du droit français* are the best guides for an outline study of this controversy.

The encyclo-  
paedists and  
the corporate  
bodies.

To the philosophers and the publicists of the French Revolution the only rights that could be called legal rights were those of the individuals. The state was bound to frame laws conserving the rights of the individuals because the individuals had agreed to part with portions of their rights in order that they might live in security. After this well-known Hobbes-Locks theory of social compact elaborated by Rousseau, between the state and the isolated disorganised individuals there ought not to be any right-and-duty-bearing entitles. To the Revolutionaries the existence of corporations with distinct rights was an

anomaly philosophical, jural and political. (1) It was a philosophical anomaly because individuals alone had rights and duties, the rights of an individualised group could not be imagined as distinct from those of the members of that group. In other words, the rights of a collectivity were the sum of the rights of individuals. The jural anomaly lay in replacing the individuals of a group by an *objective* and not merely a notional group-individual. They said, for instance, 'if you have three individuals, A, B and C grouped together, you have for the rights of the group the sum of the rights of A, B and C. To suppose a fourth individual D has risen out of this group is a fiction—it is a jural creation to which corresponds no reality.' To these two the 18th century publicists added what seemed to them a more serious anomaly—the political anomaly. They looked askance at any group with corporate rights because then the power of increasing its patrimony would make it a formidable rival of the state. The very instinct of self-preservation should, in their opinion, set the state against all other corporations.

In the 18th century it was permissible to think, that corporate property was a menace to the state. The chief representative of

(1) Levy—*L'affirmation du droit collectif*. Charmout—*Le droit et l'esprit démocratique*. Saleilles—*loc. cit.*

Corporate  
property  
unpopular.

corporate property at the close of the Ancient Regime was the property of the church. The state had to reckon with the ecclesiastical property. Its strength lay not only in the unchangeable religious convictions of the followers but, in a great measure, in the economic force that amassed wealth supplies.

Mortmain.

The inconvenience of the amassed immovable property, in the hands of a group was specially manifest when the group was a regular religious body. It was from this quarter that the evils of mortmain came. When property was in the hands of a church it was practically inalienable. The consequence was a tendency towards a perpetuation of an agricultural and a feudal regime so detrimental to commerce.

The poor  
suffered.

The ecclesiastical property—the type of corporate property according to the 18th century publicists although unfavourable to the growth of land value and commerce might have been defended had it but benefited the poor monks and clergy. But observes Saleilles (1) “this was not to be.” The abuse of the ecclesiastical rights led to the aggrandisement of the rich while the poor were left alone. The monks languished while the lords grew in wealth and power. It was this doleful aspect of the corporate property towards the

(1) Loc. cit. the above is a substance of this account of the Theory of Corporations in France.

close of the *ancien regime* that led, later on, to the demolition of all corporations and endowments lay or ecclesiastical. It was a *tabula rasa*. After a century of abnormal regime a Civil Code was framed. This Code discussed civil society, but no reference to civil personality was made therein. The jurists, however, supplied what the legislature failed to do. The constitutions of the trading companies and endowments, on analysis, yielded a notion of juridical personality.

The Code of 1804 has not much to say about corporate rights. True, there are in it sections on the co-ownership of groups; but co-ownership, is not corporate ownership. The very essence of co-ownership is that the individual co-owner conserves his rights with regard to his aliquot share of property. The co-owners in appearance seem to form a body through the fact that every one of them has only an ideal share in the undivided property. But in reality this indivisibility does not create a distinct jural person because although the individuals come together with regard to the whole, undivided estate, the rights that obtain are the rights of the individuals themselves. "In co-ownership we get," as Professor Saleilles remarks, "the individualisation of law made more permanent notwithstanding the appearance of a collective right. (1) There

The Code  
Civil of 1804.

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(1) Saleilles, loc. cit. Ch.

is no transmutation of the subjects of rights here.

The indivisibility is even viewed with distrust in the Code. It distinctly says that after the lapse of five years the members of a group have an absolute right to demand the partition of the joint property. So it can be said that the co-property of a trading group was the reverse of corporate property. The group-rights in this view arose out of a juxtaposition of individual rights. Such an amorphous condition of the group was incapable of producing unity and consequently stood in the way of corporateness.

The Code  
Penal.

If the Code civil ignored corporate rights the Code penal went a step further. It prohibited all associations of more than twenty men. A permissible association, to be legal, had to be authorised. But the administrative authorisation did not confer on the association any jural or economic rights. The association might exist as a lawful association but it could not hold property. It could not buy or sell, nor could it enter into any other form of contract ; although the individual associator could sell his share, could transmit it to his heir, could ask for a partition. In other words the association lacked the distinctive mark of a corporate body.

Association  
as a juristic  
person.

The associations had to prove themselves useful to the community before they became

invested with personality. The trend of legislation at the beginning of the 19th century was, as already noticed, not favourable to the growth of personality. But when the number of group bodies multiplied, the courts had to treat some of these at least as unitary bodies with semi-corporate rights. By the middle of the 19th century the jurists more or less succeeded in impressing on the legislature that much social inconvenience would be removed by conceding to the group-bodies rights and duties distinct from those of the individuals composing the group. The philosophers of the French Revolution, it was pointed out, made a great mistake in not recognising bodies other than individuals as subjects of rights. Their mistake arose out of a strong individualistic tendency. Because according to the accepted theory of the Revolutionary philosophers a right made the individual will apparent. In other words the rights guarded by law were manifestations of individual liberty. Somehow or other psychological liberty was confused with legal right. The letter was viewed from a stand-point usual to the 18th century encyclopædists. "Perhaps the element of error," says a distinguished French jurist "was intensified by an organised attempt, at this period, to prove that man was born along with the rights and not that the rights came to him because he was born in a given

The mistakes  
of the Ency-  
clopædists.

Juridical  
error.

medium." (1) Such a theory is obviously false. An isolated individual can no more have legal rights than legal duties. They come into existence when a man is brought into contact with a man and only after a social system has been established. There is a social right even, before an individual right. To deny collective rights is to deflect the bend of human nature because man is nothing if not social. The individual right per force occupies a secondary place in a scheme that has collectivity for its basis. The collective right is a regulator as well as a warrantor of individual rights. It is a regulator for it sets a limit to the individuals who must not interfere with the general interests of the society. It is a warrantor because the isolated individual is a feeble and powerless being. Again, the jurists added, the position of the Revolutionists in the matter of corporative rights was not very logical. The practice did not tally with the profession. The doctrine of unbounded individual liberty, unless completely modified, could not but admit one of the most important forms of individual liberty—the liberty of associating the forming private corporations.

Philosophical  
error.

Despite the convincing arguments from principle, the attempt of the legislature to check the growth of associations and collective bodies did not altogether cease. But the

(1) Saleilles, loc. cit. p. 16.

innate tendency of human nature led to the formation, even in contravention of legal rules, of groups for philanthropic, charitable and religious purposes. Fictitious methods were adopted—methods based on models borrowed from other departments of law which ultimately brought about a result precisely opposite to that contemplated by the positive law. Just as in England the Statutes of Mortmain were responsible for creating a new form of property, so in France the statutes intended for the suppression of collective and corporative rights gave rise to the formation of commercial associations and charitable endowments. Even at the present day the associations, now borrowing from partnership law, now borrowing from the law of 1910, are compelling the legislature to recognise a jural necessity created by social needs. The groups are clamouring to be treated as group-persons.

Corporate  
bodies.

It is time now to turn to the instructive history of corporation in English law.

Pollock and Maitland have shown that the law of Henry III has little or nothing to say about corporations in general. Convents, chapters and communities are much discussed in the law-books but no such terms as corporation, body corporate, body politic are found. The terms—community, commonalty or commune are generally used. “Commune or *Communitas* in Latin, is a large vague

Corporations  
in English  
law.



word ; in the 14th century it is often applied to the English nation, the community or the commune of the land, it is applied to the Cistercian order, it is applied to the University of Cambridge, for in the vill of Cambridge there are two communes, one of clerks and one of laymen, it can be applied to the Community of Marchants who hold the king's staple of wools, it was applied to the 'bachelors' of England who in 1259 had joined to obtain concessions from the king." (1) But the term corporation is not the equivalent of the term commune because while some of the communes became corporations others failed to acquire corporate character. Thus cities and boroughs became corporations but not township and hundreds, yet they were all communes. The Roman *Universitas*, although discussed by Bracton, is illustrated by Roman examples. With the exception of cities and boroughs Bracton can mention no other examples of *universitas*. *Universitas vero sunt, non-singulorum, quae sunt in civitatibus, ut theatrum, stadia et huiusmodi et si qua sunt in civitatibus communia.*' (2) This is but an echo of *universitatis sunt non-singulorum, veluti quae in civitatibus sunt, ut theatra, stadia et similia et si qua alia sunt communia civitatum.* (3) To talk of

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(1) Pollock and Maitland—History of English Law, Vol. I, p. 494.

(2) Bracton, f. 8. quoted in Pollock and Maitland, loc. cit. Vol. I,

(3) Justinian 2. l. 6.

the 'mediæval English boroughs with stadia and theatra that is nonsense.' Any theory of corporation in English law must, therefore, be gathered from the way the 13th century lawyers treated particular groups. These fall under two broad classes the 'ecclesiastical' and lay groups.

Church lands were quite common in England long before the time of Bracton. The bishop of the *civitas* controlled all the ecclesiastical property within a diocese. The German, if Stutz be correct, brought the notion that if a person builds a church upon his own land it is his church. In course of time when the proprietary right of the founder evaporated into ecclesiastical patronage—advowson—the church appeared as an owner of church property. But precisely how the parish church acquired rights distinct from those of the bishop and his cathedral church on the one hand and from those of the founder or patron on the other is a moot problem of English legal history. Perhaps there is, to quote the leading authority on the subject, 'a supernatural element in the story. Great changes take place behind a mystic veil. At least for the purposes of popular thought and speech, God and the saints become the subjects of legal rights if not of legal duties. From the example found in Kemble a saint is the connecting link between God and the church so far as the

The ecclesiastical group.

ownership of ecclesiastical property is concerned. 'To thee Saint Andrew and to thy church at Rochester where Justus the Bishop presides do I give a portion of my land.' (1)

Domesday Book and the personality of the Church.

In the Domesday Book the saint appears very often as the owner of the church lands. St. Paul, St. Patroc, St. Leotsian all held lands. Sometimes the saint holds the land of the church, sometimes the church holds the land of the saint. The saint by degrees withdrew behind the church and the idea of the church was spiritualised till it became an ideal, juristic person. This is how, Maitland thinks, the church grew into a person. (2)

A fourteenth century case.

By the beginning of the 14th century the lawyers were recognising the personality of the church. It was possible for a rector to plead that he found his church seised of that land. In a judgment of 1307 the church is treated as a perpetual infant—'A church is always under age and is to be treated as an infant, and it is not according to law that infants should be disinherited by the negligence of their guardians or be barred of an action in case they would complain of things wrongfully done by their guardians while they are under age.' (3) Here the church as a juristic person

(1) Kemble. Cod Dip. quoted in Pollock and Maitland.

(2) But see, Maitland. Collected Papers, Vol. III, p. 266. He thinks that the temporal law of the Middle Ages did not maintain one consistent strain of language. The position of the *math* in Hindu Law may be taken as an illustration.

(3) Year Book. 21.—2. Edward I.

is completely separated from natural persons—its organs. \* Along with the ecclesiastical was developing the lay corporation. The borough was the first to appear as an important corporate body.

According to Bracton the civic or burghal community is no more community but a *universitas civium vel burgensium*. (1) The clauses in the old borough charters bear out this statement. For example the Norwich Costumal provides that when a burgess is impleaded in the king's court, the cognizance of the cause might be claimed for the civic court. When such a claim was made the defendant had to pay the costs of the proceedings, if he could not pay, the Chamberlain of the city had to pay. (2) The franchises of the borough do not belong to the burgesses *ut singuli*. Although the lawyers of the 13th century use the old forms of expression proper for collectivities, they are beginning to realise that Bracton is right in assimilating the borough to a *universitas*.

Lay group.

The borough could be fined for wrongful acts and defaults. Sometimes as a punishment it lost its 'liberties.' When the Mayors of Sandwich was found guilty of asserting by acts of violence certain supposed franchises of his

Criminal liability of the borough.

(1) Bracton, F. 228. B.

(2) Bracton's Note-Book edited by Maitland

town, it was adjudged that the community should lose its liberty because whatever was done by mayor in matters affecting the community was the act of the community itself. (1) This made the law familiar with the conception that an organised act of an organised body made that body a unit. If it went wrong if it broke a law, it should be punished in its unity. The old case of the city of York when it falsely claimed to farm the ainsty and lost, for its trouble, all that it claimed adumbrated the now familiar rule in America whereby the joint-stock companies have learned the meaning of *quo-warranto*.

Civil liability.

In the region of civil liability the corporateness of a borough was not very evident. When the rent of a borough fell in arrear the king proceeded against each burgess or all as he liked. This joint and several liability suggested a convenient procedure for realisation of dues. The burgesses would be assessed in proportion to their wealth, the rich would be got at before the poor. Such a levy was both equal and sure. The 13th century boroughs had very little lands or goods and a wise course under the circumstances was to look to the purses of the rich for the payment of dues. In the 15th century, however the idea of corporate civil liberty was coming to the

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(1) *Placit. Abbrev.* 273.

fore. The Year-Books mention (1) that an action of trespass was brought in 1429 against the Mayor, Baliffs and one J. Jabe. The defendants pleaded that "Jabe was one of the commonalty and therefore was named twice over." It is not known how the case was decided but the judges admitted that when a community was amerced the common course for the King's Bench was to levy the amercement from all the goods of the members of the community. The corporate as opposed to individual liability in civil matters was, then crystallising out of collective liability by the time that Jabe's case came from the court. (2)

After what deviations and uncertainties the idea of corporate liability was firmly grasped is best illustrated by the cases of debts owed to communities. The hundred Rolls mention that the jurors of Northampton asserted that Henry III, when he died, owed £400 to the community of Northampton. This might be supposed to be a clear instance of a debt due to a corporation. But an examination of the process how the debt was incurred would dissipate such a notion. The jurors say "during the twenty last years of his reign the king's *captives* took to his use peltry to that value in the fairs of Northampton, Stamford,

Debts due to  
the boroughs.

(1) The substance of the above is taken from Pollock and Maitland Legal History.

(2) F. B. 8. Henry VI. *Vide* Pollock and Maitland. Vol. I. pp. 495-98.

St. Ives, Boston, Winchester and St. Edmonds ; what is more he owes the drapers of Northampton £100, for goods taken in the same fairs." Surely King Henry has taken the goods of individual traders, for no joint-stock trading by the burgesses of Northampton is mentioned. So the debt due to the community is a sum of the debts due to the individuals thereof. Again a merchant of X owes a trading debt to a merchant of Y then if other merchants of X go to the town of Y, or to some fair where the creditor finds them they will like enough be held answerable for the debt—at all events if he proves that he has made a frintless effort to obtain justice in the court of X they are the *communares* of the principal debtor, they are peers and parceners, they are in scot and lot with him, and they and each of them, must answer for his trading debts. (1) This is the idea of collective and not corporate liability. Indeed throughout the Middle Ages *pure* corporate liability was not of frequent occurrence. It showed itself more often than not in a mixed form. (2)

The Common seal and borough's property.

The truly corporate character of a borough appeared with the use of a common seal in transactions of the borough. The seal was an 'outward and visible' sign of the borough's

(1) Maitland—Township and Borough. Pollock and Maitland.—Hist. Eng. Law, Vol. II.

(2) Jenks—Law and Politics in the Middle Ages.

unity. When this unity became patent all that was necessary to perfect a 'collective' borough into a 'corporate' borough was that it should own property. The property that helped the evolution of corporate unity was the property that the borough had in its franchises and tolls. In the records of Nottingham the burgesses of Nottingham are mentioned as having demised to the burgesses of Retford the tolls belonging to the borough of Nottingham 'to have and to hold at farm to the said burgesses of Retford and their successors, of us and our successors, for ever at a rent of 20 marks.' This is an unmistakable sign that the two boroughs are acting as two persons. For in the language of Maitland, it can scarcely be thought that the new burgesses of Nottingham are in any tolerable sense co-owners of the right of taking toll. No one of them is entitled to any aliquot share of the tolls; no one of them has anything that he could demise to a burgess of Derby or of Retford; may if the Retford folk took a separate deed from each man of Nottingham they would get nothing thereby. What is wanted is not joint action but constitutional action; a common seal must be affixed by those who according to the constitution of the borough are entitled to affix it. Our borough is a person now.

This brings to an end the rapid survey of corporations in Europe. It appears that two



of the highly civilised countries of antiquity.—India (1) and Greece,—have not played any important part in developing a *Korporations-theorie*. The *Sanghas* of *Manu*, the ancient Indian *grama* which according to some had its seal, and the religious endowments of Greek and Hindu law might have developed into corporations of a real person type; but this was not to be. In the Athenian law as Sarazin; (2) has shown the religious foundations were entrusted to the liturgical committees. From the numerous inscriptions it appears that these committees were like groups of trustees. A trust is in no way affiliated to a corporation. Thus it was not given to one that did so much for thought and culture to contribute to the material development of jurisprudence. If ancient Greece failed for a negative reason, ancient India failed for a positive one so far as the real-person theory of corporations is concerned. For while the former could not distinguish between grouped persons and group-persons, the latter carried the distinction so far as to put each class in a water-tight

(1) Position of idol in Hindu Law is discussed in the lecture on corporation sole. "We must not assume too readily that a Hindu deity is a juridical person for purposes"—Mookerjee, J. in *Bhupati nath v. Ramlal*. 14. C. W. N. 32. देवस्वामो देवस्त्वैवम् इति उपचारमात्रम् यो यदभिप्रेतम् विनियोक्तुमर्हति तत् तस्य खं, न च ग्रामं स्त्रिवं वा यथाभिप्रायं विनियुङ्क्ते देवता—Savara. On the Purbamimansa. Adhyaya ix. pada 1. Quoted per Mukerjee, J. in his judgment.

(2) Etude sur les Fondations dans l'antiquite.

compartment. The Hindu law, as the authorities (1) say with one accord, like the Roman law, is familiar not only with corporate bodies but with juridical persons or 'subjects' called the foundations. These subjects, however, are far too ideal to be of service to the realist. Behind the too much ideal temple are hiding the too much *Sebaitis*. Behind the *math* is lurking the manager. The temples and *maths* with mosques and *Khankas* have now been packed away under a Religious Endowments Act. *Sebaitis* and *Mutwallis* need no longer trouble the followers of Gierke. Perhaps one would still turn to that perpetual infant of the Middle Ages, the church, and say that she is a juridical cousin of the Hindu *math*. (2) But it must be remembered that she is a cousin several times removed. Why this has been so is not an easy question to answer. The history of Hindu law is yet to be written. When the historian comes he will prove how true is the remark of the great historian of English law — 'the matter of legal science is the actual result of facts of human nature. The practical experiences of nations determine the bend that their legal systems take.

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(1) West and Bühler Hindu Law, p. 553.

(2) The *math* is generally cited as a juridical person in Hindu law (Babajirao Gambhir Sing v. Laxmandas Guru Raghunath Das, I. L. R. 21, Bombay 215). But it must not be forgotten that the *manager* lurks behind the *math*. A real-person theory must not overlook this fact. The position of a *math* in Hindu law will be discussed later on. Juridical ideas need constant revision as the recent Calcutta Full Bench decision already referred to shows,

Conclusion.

The thread that connects so apparently diversified subjects of rights and duties as the Ecclesiastical commissioners of England, the Dean and Chapter of Ely, the Chancellor, Masters and Scholars of Oxford, the Mayor, Aldermen and Burgesses of the Borough of Cambridge, the Governor and Company of the Bank of England, the Great Northern Railway Company, Styles, Nokes and Company (Limited) reached India in the nineteenth century. It is the object of the following lectures to dwell on the salient features of Indian Corporations, to justify once more, if justification were at all necessary, what according to the outstanding English jurist of the nineteenth century has been well put by the outstanding English poet of the nineteenth century.

“Justinian’s Pandects only make precise  
What simply sparkled in men’s eyes before  
Twitched in their brow or quivered on their lip,  
Waited the speech they called but would not  
come.”

Legal theory, in the inimitable language of Maitland, registers the accomplished fact.

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(1) Browning. *The Ring and the Book*, Count Guido, 1781.  
Maitland—Township and Borough.

## LECTURE II.

### Theories of Juristic Personality.

IN the introductory lecture I have shown the importance of certain juridical theories in connexion with the considerations determining the legal position of the corporation. In the present lecture I propose to deal with those theories somewhat in detail, so that we shall be the better prepared to understand the influence of theory on practice and *vice versa*. Let us start with what is known as the fiction system.

Savigny is generally regarded as the inventor of this system. But this is going too far. Since the Roman time terms implying artificial creation have been quite frequent in jurisprudence. The expression *persona representata* or *ficta* is due to Roman influence. Savigny strictly speaking invented nothing. He only made the idea more precise and deduced consequences from the theory. And one is not sure whether the idea and the terms of Savigny have not been exaggerated. Savigny is mainly thinking of the capacity of a juridical person. It goes without saying that a group must fulfil certain legal conditions in order that it may have legal capacity. So Savigny says "a college of judges appertaining to the same

tribunal and discharging similar functions do not constitute a juridical person. In every system it is necessary for personality and capacity that certain legal conditions should be fulfilled.”(a) This is the gist of Savigny’s statement that the problem of personality views a question of juridical capacity extended artificially to fictitious beings. And he adds ‘one calls them juridical persons, that is to say, persons who exist only for juridical aims.’ This means that in the legal domain certain ideal persons are regarded as existing, in order to attach legal consequence to them. In other words certain legal consequences are regarded as necessary and these are grouped round a common idea. The idea of personality is such a one. According to Savigny these persons have an existence—although a purely juridical existence. The essential part of his thesis is this :—Real persons may be opposed to juridical persons in the sense that the former are not created, individualised by law, law has only to recognise their personality, while the latter are exteriorised, individualised by legal conditions, law has to put in artificial means for conditioning their existence. His disciples, however, went a little farther. They found that several individuals however knitted together do not give rise to a distinct person.

(a) See Savigny *Loc. cit.* French Ed. Bk. II S. 85, Seq.

If the sum is supposed to result into a new being, the latter is ideal, a unity created by the mind when there is diversity in fact. If the law regards such a group as a new person independent of the individuals in the group, it is only through jural fiction. The juridical personality is then a legal creation. The practical consequence of such a hypothesis is that the will of the state as a supreme factor in corporative matters follows from the theory. This has been termed the system of legal recognition. According to this system the only juridical persons are those recognised by the state and the capacity and personality of these exist in proportion as they are allowed by the state. The state recognition might be special or general *e.g.* the statutes applying to the groups of a different class are instances of general recognition, thus the Companies Acts in India, the enactments for the *collegia tenuiorum* in Rome are of this kind, while the French Law of 1884 for known professional syndicate is an example of special recognition. Moreover the recognition may be explicit or implicit. *e.g.* S. 529 of the French Code, several sections in the Indian Companies Act 1882 implicitly recognise personality of a company.

Let us note some of the objections to the "Fiction Theory." Michoud has admirably summarised them in his famous treatise on the

theory of moral personality.(a) Zitelmann, Meurer and Mestre are amongst some of the authors of the objections recorded by Michoud. I shall follow his lead. The first objection is that the 'fiction' explains nothing, it is powerless to offer the key to the problem put. The juridical problem is concerned with the explanation of ownership by a juridical person. To say that in the case of a group person the property belongs to an ideal fictitious being is to say that it belongs to nobody. If a right always connotes a subject, to imagine that a fictitious subject may carry a right is, as Brinz says, to 'hang a hat on an imaginary peg.' (Pandekten, quoted by Michoud). The fiction, it is true may serve to explain some other juridical theories, by itself it explains nothing. Whatever form the fiction theory may assume, it leads to difficulties in practice. Thus Bohlau, a supporter of one form of fiction, regards a juristic person as a property without a real owner, this mass is like a human subject, it plays the role of a human being. The Roman idea *personae vice fungitur* is appearing here in a different garb only to make matters more complex. Again some like Windscheid (b) try to explain the personality through a common tendency of human mind—anthropomorphism. The juristic person, they say, is

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(a) La Theorie de la personalite morale p. 18.

(b) Pandekten S. 49.

but a product of the tendency to "personify" the concepts. All these attempts fail to explain the problem—they add one more difficulty through recognition of 'subjectless' rights.

The second objection rests on the fact that the fiction cannot explain the basic phenomenon of public law. Whatever might have been the case in early times the modern systems all recognise the personality of the State. The Units of International Law are not fictitious units, so the sovereign that impresses its will on its subjects is not fictitious. The unity of the state requires personality. This unique person has public rights and public duties as well as private rights and private duties. It is a subject of administrative law and it is bound by many of the rules of private law. A legal system that refuses personality to the state is subject to the awkward necessity of inventing many fictions to explain the many sided activity of the state. The treasury *e.g.*, is a 'foundation' in such a system, a strange device no doubt, for the essential characteristic of a foundation is its personality. To avoid one fiction they have built up many fictions.

The third objection to the fiction theory is that it misunderstands the part that the legislator plays in social relations. The legislator creates nothing by himself. The material existence of the things to which legal attributes are affixed is independent of his



legislative activity. He can only consider certain relations as illegal and prohibit them. When a group through its associative activity desires certain objects and intends to have proprietorial powers, the legislator does not and should not deny his assistance. This manner of looking at a corporation is no fiction, it would have been so if the legislator acted otherwise. To deny to the group the rights and duties and to assert them as existing only in relation to the units in the group is to go against the evolutionary tendency of modern industrialism. The hypothesis of pure fiction is then untenable so far as juristic personality in modern law is concerned.

The next system of theories is due mainly to Brinz, Bekker and Duguit. The system agrees in holding the principle that man alone is a typical person. According to the followers of one or other of these theories group personality as well as other types of juridical personality may be explained by the ideas proper to the personality of a human being. Two courses are possible : (1) one may consider the mass of rights and duties as belonging to no particular individual ; (2) one may consider them to belong to the units in a group. Brinz and Bekker have chosen the first course. Their theory may be termed the theory of subjectless rights. Brinz says "according to the Roman idea, the city is *not* a person, but it *holds* the

place of a person. In other words in the Roman division of persons, there is neither a moral person nor a fictitious person but only men, it is only in the Roman division of things that juristic persons in modern sense occur. But the Romans did not create a second category of persons, they are content in saying that certain things, although subject to a special kind of rights, are *res nullius*. The modifications due to modern Romanists are not present in the writings of the Roman Jurists. To say that the State and the cities are persons is only to give play to fancy and such statements are not at all scientific. The modern jurists have introduced a popular metaphor into the juridical language. To justify this metaphor they have assumed a maxim—no person no property. This principle, once assumed, has led them either to the recourse of a fictitious person or to the attempt at proving the reality of moral persons. All their attempts have proved vain. It is not necessary to seek for a fresh person in these cases. Because property may belong not only to *some one* but also to *some aim*, the aim, for the matter of that, does not become a person. The patrimony of a moral person is the patrimony of an aim (Zweckvermogen). This notion of aim is found in the *Universitates* such as the State, the communes, the corporations, the foundations, the establishments *pice causæ*. The current

conception has personified this aim, the personification being attached to the more visible parts—the City, the Gods, the Corporation, the Temple, the Church, the Hospital, and the Fiscus. . But the reality is that the property here is owner-less.”

Bekker has made this theory more subtle from the philosophical standpoint through the notion of the subject of rights. Two distinct situations are possible with regard to one and the same rights—disposition and enjoyment. Disposition includes the right to conduct oneself as a master to defend the property in courts, to administer it; enjoyment is the right of appropriating the material benefits that the property produces. These two situations are often separated, the first may appertain only to a being with volition, the second may appertain not only to human beings endowed with volitional powers but also to those incapable of willing such as the infant and the mad man and even to animals and inanimate objects. One may dispose of property for the benefit of the latter, a condition regarding the administration of property so left being attached. Are these then subjects of rights? Bekker would say no. What is protected in such cases is the intention of the founder provided it is not *contra bonos mores*.

The common objection to this theory is that the notion of subjectless rights implies a contra-

diction in terms. Such an objection is evidently based on the definition of a right. But there is another objection independent of all definitions. If a subjectless right is premised what is there to prevent the State from doing what it likes with such rights. True the aim is attached to the rights as an invariable attribute but the moment no other body than the State itself intervenes for the preservation of the aim, every obstacle to the reckless administration of the endowment, if it be endowed property that is under consideration, is removed. The State in this system remains the master of the situation in all matters connected with group property. The physical persons who have created the patrimony of the moral person, who have developed it, who have proposed the aim of its activity, are purely and simply brushed aside as non-existent. The bond between the right and the persons is broken. By the side of subjectless rights, is the masterless property that the State can do whatever it likes with and no one can raise any legitimate objection against the reckless behaviour of the State. In such a regime a corporation will be allowed a precarious existence. So long as the State finds no formidable enemy in the corporate organizations, the latter is safe, but the moment it develops power, it becomes well nigh doomed to destruction. Such is the danger of Bekker-Brinz theory.

The theories that have been mentioned just now deal with private law. Duguit has put forward another theory in his studies on Public Law where he deals with the *broader* aspect of juristic persons. He has denied the utility of the conception of moral personality in public as well as in private law. His theory is based on the philosophy of law that the author himself has preached. It is derived from considerations regarding social solidarity and a new view of the relations between the governor and the governed. The outline of his theory is given here.

Social observation reveals on the one hand the existence of social solidarity whence flows the rules of objective law to which every individual should conform, and on the other hand the existence of individual wills which should be realised in conformity with the rules of objective law. It is inexact to think of the subjective rights as relations between two subjects. They are simply powers appertaining to a will when the latter conforms to the rule of law. The expression subjective rights ought to be replaced by the expression 'subjective juridical situation,' which does not necessarily suggest any relation between two subjects. This being supposed, the notion of juridical personality like many another current juridical notion is wholly useless. If the will of the representatives of a group produces a more

extensive effect than the will of the ordinary individual, it is not because the group has a personality but because, it is conformable to the rule of law that a more extensive effect should be produced. Moreover the State should not be regarded as a moral person, to regard it as such is to create a fiction. The State has no existence separable from that of the complex of the governor and the governed, the former being distinguished from the latter by his greater power. The power of the State is thus more simply explained by the fact that the governor can make his will supreme in accordance with the rules of administrative law, than by any theory of sovereignty of a moral person.

Against the theory of Duguit it may be observed that the device proposed by him is insufficient. To take his own example of a juridical person—the State, he puts the governor and the governed in the place of the juridical person. He is replacing one abstraction by another. He reduces all the phenomena of juridical life to the acts of individual will subordinated to a rule of law. Such a procedure might do in some cases but it does not explain all the consequences of juridical facts. Let us take a concrete example. Suppose X enters into a contract, as a result of this contract certain intended acts of X should conform to the rule of law. To put it more explicitly X intends to have certain rights and obligations

in virtue of the contract. As to the results of the contract all theories are in accord, but how to find out after Duguit which X is to have the rights and duties? It is always a physical person, no doubt, that enters into a contract, but the one and the same physical person may pass into a thousand diverse conditions: he may act for himself, for the State of which he is an agent, for the commune or department that he administers, for the commercial association that he directs, for the society of which he is a president, for the minor whose estate he administers for another who has given him powers of attorney etc., the contract binds him alone only if he acts for himself, but otherwise it may bind a series of other physical persons. How to determine these series of persons without having recourse to the idea of personality and without determining who is the subject of rights to whom the contract is imputable? Duguit is satisfied by saying only that the contract will produce all the consequences desired by the legal rule, that is true but the reply is rather short. He does not deny, moreover, the continuity and the unity of the State but he does not give to these facts proper juridical expression, he does not furnish us with an instrument to guide us amongst the complexities of life. In his theory the idea of *imperium* is only a survival from the monarchical regimes.

It is hardly necessary to show the social danger that may arise out of such a theory. It recognises, in principle, the right for any one, not only to examine the conformity to the law of the governing will in a State, but also to employ force to make his own will prevail over the will of the governing body, when he thinks it most conformable to the rule of law. This is an anarchical theory incompatible with social necessities. It is needless to follow Duguit in other details, the modern social conditions will not allow his explanation of moral personality, or rather his attempt to explain away moral personality, to pass muster.

There is another way of explaining the juridical phenomena generally grouped under the name of moral personality, without recognising that personality to be real. It proceeds from considerations diametrically opposed to those detailed till now. Instead of admitting subjectless rights and consequently ownerless property it is supposed that all rights of property, every juridical capacity belongs solely and wholly to physical persons. Moral personality in this view is a useless conception because the phenomena which are bound up with it are but modalities of rights of physical persons. "Man alone exists and has legal rights and duties, the personality of moral beings is only apparent, a deeper analysis shows that is a juridical artifice, a sort of



scaffolding which may be put away on perceiving that at bottom all rights belong to individuals." (Michoud, p. 54).

To Van den Heuvel we owe the further development of this theory. Among other things he proves the uselessness of the conception of the moral personality by a reference to the special rules of the contract of association which are generally explained with the aid of this concept. He takes the case of trading corporations which have of all other associations been best studied in all countries by the jurists. One of the essential characteristics of a company is that the property of the company does not belong to the individual members of the company but to the company as a group-person. From this three results flow (on the supposition that the juridical person is real):—(1) The rights of the associates form movable property although the association may have immovables alone. (2) The company's fund is not liable for the debts of the share-holders. (3) In a law suit the company is represented by its managers. Van den Heuvel says "Explain these three rules without the help of fiction and you will have shown the uselessness of the conception of moral personality." According to this jurist nothing is easier to prove. The last rule is explained by the idea of representation in a court. The Manager who sues or is sued, in the name of the company, in

reality represents the individual members. As to the first, the personal nature of the shareholders' rights, it is a rule founded on admitted practical utility, the transfer of immovables, in all countries, is attended with difficulties, which the shares should be as susceptible of easy transfer as possible. There remains the second rule to be explained. But this only refers to a simple separation of rights which is effected in many instances without the aid of the notion of civil personality. If I contract a debt unconditionally the creditor may charge all my present and future property with the amount due to him, but might I not with his consent increase or reduce the amount of security? In carrying certain property to the company as a shareholder I am regarded as having affected this with the obligations that I may incur in future as a shareholder. This is quite natural if others consent, the law in allowing the individual property, to be kept distinct from corporate property, has only recognised the freedom of contract. All the special rules of company law may in this view be explained without any reference to moral personality.

Varielles-Sommieres—A Sweedish jurist does not go in his first work so far as Van den Heuval. He limits himself to the fact that the associations not endowed with personality have the right to possess and thus the situation of

these in law is not different from that of the personified groups. He admits that the law may recognise a sort of fictitious personality in certain cases, but ~~there~~ the attribute is only ornamental. In his more recent work (a) he has taken the position of Van den Heuvel and has elaborated it in several respects. He has regarded all corporative groups as kinds of associations. The rights which the current doctrine regards as being those of the group-persons are in reality the rights of the associates. The latter are the real co-owners of the corporate property. They are, however, subject to certain special rules of law, so far as the exercise of their rights is concerned. These rules may be said to flow from a 'personificatory regime,' and are characterised by the following traits. (1) An associate cannot, without the consent of all other associates, diminish the extent of group-property by withdrawing his share through alienation. (2) An associate cannot sue or be sued separately for the active or passive obligation of the group respectively. (3) An execution cannot be levied on an associate as separated from the group. The result of these three rules is that in relation to third parties associates seem to be combined to form a group person. Hence the temptation to compare a corporative group at first to a person and then to declare it to be a person in law.

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(a) *Les personnes morales* (1902)—Crowned by the Institute.

In reality it is neither a real nor a fictitious person. And for that reason the only utility of the conception of personality in this connexion is of 'artistic and pedagogic order.' From a distance the associates appear to be one man, one person having patrimonial rights. This, moreover, is an excellent process of conception and exposition, it may render service to the teaching of jurisprudence by enlivening the language and lightening the thought. Such is the utility (a)—the whole utility of moral personality. The consequence of this system is that moral personality is not a legislative creation but a particular situation that results from what is called the associative régime. The author applies his theory to every group endowed with personality, from the state to the private endowments. He is obliged to deny personality to all corporations. To his doctrine approximates that of Planiol and Berthelemy which reduces moral personality to the notion of collective patrimony. This theory introduces this new term otherwise it is essentially similar to that of Vareilles-Sommières; because the latter equally admits that corporative property is not like ordinary co-property but it is co-property subject to special laws.

According to Planiol the idea of moral personality is nothing else "than a simple but

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(a) Vareilles-Sommières—Op. cit. p. 225.

superficial conception which hides from the eye the persistence, down to our times, of collective property by the side of individual property." (a) Berthelemy says "We may own a field or a herd of cattle in three ways; individually; that is to say each for a divided part, undividedly; that is to say each for an aliquot part, collectively; that is to say all the owners together being regarded as making up one owner. When I say that the state is a moral person, I wish to express nothing else than this—the French are collectively owners of goods and entitled to rights." (b) Planiol insists, moreover, on the necessity of special rules of law for the administration of such property under a unitary régime, that is to say, rules that differentiate such ownership from purely undivided ownership.

It may be mentioned in passing that these French theories are already present in a germinal condition in Ihering's *Spirit of the Roman law*. For him the true subjects of rights, in the cases of moral persons, are isolated individuals. "The juridical person, as such, is incapable of enjoying, it has neither interest nor aim, it has rights in so much as it is useful to those who have rights, in so much as it attains its aim. A right that never helps it in

(a) Planiol—*Op. cit.* No. 675.

(b) Berthelemy—*Op. cit.* p. 43.

this achievement is only a chimera irreconcilable with the fundamental notion of a right. The isolated individuals appear, in their special juridical relations with the external world, as moral persons." This principle is applicable no doubt to the associations where the associates are true subjects of rights. As to the endowments Ihering says that the true subjects of rights are the 'destinatories' of the foundation; that is to say, the sick, the indigent and the orphan who profit by the establishment.

The objection already made to this fiction theory applies to all these systems. They are theories of private rights, unable to explain the existence, the unity and the perpetuity of the public moral persons. Moreover they look at one side of the moral personality—its proprietary side. They cannot explain the State. This is not all. Even in the domain of private law the explanation of moral personality as given by them is inexact. Because these theories, unlike the fiction theory, see only the individuals in a group. They forget that even in a group, there is a collective interest distinct from individual interest and sometimes opposed to it, and this interest is not only that of the group as it exists at any time but also that of a permanent group, the latter representing the future generations. One of the consequences of the system under consideration will be to allow *in all cases* the present members

of a group to divide among themselves the group property; this is the doctrine which the French Revolution applied to the "commune" property in 1793. The article 542 of the Code Civil shows the futility of such an idea.

According to others, of whom Michoud is one, the moral person is not a fictitious being. It is well to state shortly the position of these 'neo-realists.'

At the start, it is necessary to note that although the 'person' is not one in the strictly philosophical sense of the term yet the notion of juridical personality has with the neo-realists assumed a quasi-philosophical form. The problem consists in knowing who are the beings regarded in law as capable of having rights and duties. To solve the problem it is necessary to understand the subjective sense of 'rights.'

As has already been stated in the introductory lecture that in ordinary view the subjective "right is a power attributed to a volition by the objective law, a faculty of willing recognised by the law." This definition, is, however, incomplete, because it shows only the consequence of subjective rights, not its foundation and *raison d'être*. It is restricted to the Kantian view of law—"the totality of conditions in which the liberty of each may co-exist with the liberty of all, according to a general principle of liberty." For those who admit this idea, subjective rights exist only

for the benefit of a being endowed with personal volition and liberty. Juridical personality will suppose then the existence of a 'volition' of this kind and will, consequently, approximately coincide with philosophical personality.

If one adopts this point of view it will be necessary to prove for the reality of moral personality that the group person has a volition similar to that of an individual and this volition is likewise free. But the authors who based their theory of moral personality on this definition do not try to prove as much. This is notably the case with the so-called Germanists. The group-person is real to them because it has a group-will distinct from the individual-will. They do not try to *demonstrate* even this but are content with a simple assertion. Thus Gierke says "The capacity of willing and acting exists in and with the personality of corporations. For us the law attributes personality to them precisely because it sees in them subjects having one and the same, continuous, collective will. Here, as in the individual we see the basis of subjectivity in a volition which is the internal force, the principle of external action." (a) As against this simple assertion, the attempts at demonstrating the existence of a collective will may shortly be passed under review :—

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(a) Genossenschafts theorie, p. 608.



(1) Some have sought the demonstration of the existence of a group-will in what is called the organic theory of society. The most advanced partisans of this theory, *viz.* those who carry its consequences to the utmost logical issue, attribute formally to the societies—which for them are organisms—volitions similar to those produced in human organisms. Men, the cells of social organisms, play the same part in social volition as the cells in the human body in the mechanism of individual volition. Like the individual the society has its brain. The decision that it takes, is the work of the cells of this brain as the decision taken by a man is the work of his brain cells. In the one case as in the other there may be struggle between the cells for adopting an idea, the decision is taken when some of these have prevailed upon others as regards that idea. “Our being is very complex, many volitions are formed at the same time. They engage in a furious struggle in our nerve-centres. The volition that prevails is the one supported by most of the cells. At a certain moment some cells ‘weight’ the balance. Similarly in our legislative assemblies some deputies assure the triumph of a proposal to the detriment of another.”(a) To the objection that the cells of our brain are neither free nor conscious, they have no volition of their own while in the social brain

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(a) Novicow—Conscience et volontés sociales.

the human-cells themselves arrive at a decision attributed to the society, one may reply that the difference between a cell and a human being is only of degree, the cells are endowed with a kind of conscience, and human liberty is only an illusion(a). With the man as in the society volitions are formed by the reciprocal actions of cells on one another, the actions being determined by the structure of the organism and external influences.

If this doctrine is admitted and if it is extended to all human groups—about the latter point there is some disagreement among the authorities—a group of men should be treated like an individual. The groups are endowed with volition like men, their volition has the same degree of reality no more no less. From the notion of organism will flow the notion of juridical personality. Every organism capable of producing a volition will tend to become a moral person.

Without entering into a detailed discussion of this view it may be mentioned that the doctrine as enumerated does not solve the problem satisfactorily. First of all it admits the idea that social groups *are* organisms. Now it is known that this notion, at one time favoured by socialologists, has now been abandoned by a great majority of them. True there are certain points of resemblance between the social groups and

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(a) Worms.—Organisme et Société p. 59.

biological organisms, but the points of difference are no less numerous and it is doubtful whether there is any gain in uniting the two under one name. Even admitting that the term 'organism' is applicable to both it is found that no advance is made in the juridical domain. In order to draw the philosophical personality out of the notion of organism something more than a mere statement regarding the similarity between the society and living beings is necessary. It is necessary to show that in the social organisms there is a volition in the same sense as in the human organism. Now to establish this assimilation recourse must be had to absolute determinism ; the consequence being the denial to human volition of law making basis.

(2) Certain other realists start from a different standpoint. Zitelmann is the foremost of these. He has developed a new volitiontheory (Willenstheorie) that may, aptly, be termed an idealistic theory. He talks of the 'organic unity' but he means the unity of diverse parts to form a consistent whole, or in other words the unity in diversity. "A group of individuals," he tells us, "becomes, since it is organically united, a new real being distinct from the individuals composing it, but having in it all the qualities common to these individuals. This law is fundamental and one may express it symbolically: if two bodies A and B unite purely and simply, they do not form by their

union a new individual, their union gives simply  $A+B$ . But if to this union an organic force is added,  $A$  and  $B$  form together a third body  $C$  different from both  $A$  and  $B$  but having qualities common to them. This third body is not a fiction, it has as real an existence as that of its component parts. The principal formula is then  $A+B=C$  as opposed to  $A+B=(A+B)$ ." Zitelmann illustrates this principle from various departments of human knowledge. The human body is something else than a certain quantity of Oxygen, Hydrogen, Nitrogen, Carbon, Sulphur, Phosphorous; something else than a certain quantity of bones, blood and flesh. There is in it a principle of unity resulting from that force, essentially unknown, which is called life. It has nevertheless, a quality common to its component parts, it is like them matter. Again the chemical compound is something else than a mixture of its components, the principle of unity here is a chemical affinity, the quality of parts that is found in the whole is that of being chemical matter. Similarly a work of art is more than a combination of sounds or of colours, its principle of unity is in its aim—the realisation of the beautiful.

This idea of unity is utilised in Zitelmann's theory of *universitates personarum*. It is necessary to remember, however, that men do not supply the principle of unity in collective

persons, otherwise the whole being similar to the parts, will be itself a human being. The volitions are united here. Man is not the true subject of rights, it is the human will. As Meurer has put it "the juridical notion of personality is wholly in the volition, for law the physical person is a juridical person with a physical superfluity" (*a*). The volitions thus grouped have in them a principle of unity which is the common aim ; their union constitutes a whole distinct from the parts yet having a quality common to each of them—this common element is the volition.

The most unfortunate part of this theory is that it does not rest on reality. It is wrong to say that law regards volition alone. Law has in view the entire man with his needs, aspirations, desires with his body and soul. Zitelmann may have attained his aim through this psychological alchemy, but it does not lead one far into the juridical domain. He does not say who is the subject of the will. Mere abstraction, an attribute will not do in Jurisprudence. Again he makes a curious mistake in supposing that his formula will not lead to contradictions in some cases. Moreover his theory fails to explain the difference between corporations and endowments ruled by trusts. He has, in fact, proposed a second theory to meet this difficulty, but that need not detain us here.

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(*a*) Meurer l. c. p. 74.

(3) In France the theory of moral personality\* based on volition found its first exponent in Rousseau. His theory of social contract is well known. He said in that connexion "By this act of association a moral and collective body is produced, composed of as many members as the assembly can afford, through this same act the body gets its unity, its common self, its life and its volition." The group-bodies do not owe their personality to a gift of the State in this theory. The State intervenes not to allow or refuse personality but to permit or prohibit the grouping itself. The peculiarity of Rousseau's theory is that the volition of the group-body is supposed to be formed in the midst of the group by the union of the volitions of the members. But the theory is as incomplete as other theories of general volition, because it does not show how the fusion of volitions may give rise to a volition of a distinct person. It is, however, incontestable that this theory, although imperfect is the forerunner of more complete theories of moral personality.

Hanriou (a) has made a remarkable attempt at setting forth a comprehensive theory. The fundamental idea that he has introduced in the discussions regarding the personality of group-bodies, is the one of reality of representative phenomenon. Passing this

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(a) *Revue generale du Droit* 1898 p. 5.

phenomenon under review in its various manifestations, he shows that the representation is not a fiction but a real fact which grows out of the fusion of the wills of the representatives with those of the represented. In an associative group it is seen, in all sorts of decisions, to take the form of a human volition. This fusion is, however, not complete. The law is obliged, in order to consider the volition thus disengaged as a unique volition, to give to this phenomenon a continuity and importance which it has not in reality. But the process is familiar to law. Even in the notion of individual personality it works by way of abstraction, by putting in relief certain phenomena as simple and continuous which truly speaking are complex and discontinuous. "The individual personality juridically conceived appears continuous and identical to itself, it is born with the individual, it is constituted at the first start, it remains always the same during the existence of the individual, it sustains continually immovable juridical relations, it is awake while the individual is asleep, it remains sane while he is insane, sometimes it continues even after death, because there may be the successor—the continuator of his persona. But as a matter of fact the volitions of men are intermittent, changing, contradictory; the volitions vary even with regard to one and the same object. On this ever-changing, tumultuous face of men

agitated by many caprices and passions law has put an immobile mask" (a). The volitions of moral person, like those of individuals, are not always the same, nor are they always active. It is sufficient for law that they exist, it will make it the basis of juridical personality of the collectivity. "The part played by fiction is no greater here than in the case of physical legal persons and the fiction, moreover, is not the worth of public authority but that of the social medium" (b).

There is some truth in these observations. But, it must be remarked, that the theory applied only to voluntary groups. In these there is at least a persisting volition that continues notwithstanding the opposition of some of the members—this is the volition to carry on the work of the association. One may say, then that here is a fusion of individual wills, a sort of unanimity. But in the State or the commune where the will of the minority prevails, where no such unanimity prevails, there is too much of fiction to assert that individual wills are fused into a common volition. The difficulty is greater as Hanriou himself admits, in the case of endowments. Because the beneficiaries,—the poor, the sick, the students, etc., are the persons represented by the managers of the corporate charities. Surely it is a gigantic fiction to suppose that

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(a) Loc. cit. p. 149.

(b) Loc. cit. p. 136.



the will of the corporation here is made up of the wills of the future and present individuals. There is another objection to the theory as put forth by Hanriou. In admitting the reality of the fused volition why not attribute it to each of the individuals in the group and not to the group itself? Perhaps the answer will be "the volitions are systematised into a unit." But the operation of the volition is similar in the case of non-corporate groups as in the case of corporate groups *e. g.* in the case of co-owners, the manager of joint families, members of a political party. What is the criterion for distinguishing the phenomenon in any of these cases from that of the juridical personality? It is necessary then to prove the 'real' existence of fused volitions.

Hanriou comes back to the question in his *Lessons of the social movement* (a). Here, however, he has modified his theory. He rests the unity of the corporative will on what he calls the "representative unity," that is to say the agreement of mental representations existing at the interior of a corporation. "It is necessary that at the interior of the corporation and about it in the social medium, there should be a unanimity of mental representations giving rise to corporate rights. These mental representations can only be the works of representative solidarity. The members of the

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(a) *Lecons sur le mouvement social.*

corporation form an idea of association, its aim, its interest, the rights that it ought to have and the acts necessary for exercising these rights. On all these points the representative unity is accomplished not in virtue of the unity of the organism, but by unanimity.....The rights realized are those wished for by the unanimity of wills based on an unequivocal mental representation. Hence they may be, I conceive, attributed to a unique moral person." This is substantially the idea of fusion of volitions expressed in new terms. Only in this statement the theory of unanimity is mixed with the organic theory. When the unanimity is not obtained, constraint becomes necessary; it is furnished by the social organism in the interest of the organism itself; that is why when a defacto unanimity is unobtainable a de jure unanimity is made to result from the decision of the majority. This is the famous majoritary principle obtained in modern corporations. A reference will be made latter on, to this in connexion with the bye-laws made by a municipal corporation.

With regard to Hanriou's latest theory it may be observed that the new enunciation nearly destroys his older supposition. When the constraint appears it is then that the fusion of wills disappears. Surely the majority in a group cannot form the group-person. Hanriou himself has noted this.

(4) Boistel in his *Cours de philosophie du droit* and *Conception des personnes morales* has attempted to show that moral personality flows, as a consequence, from the definition of personality. For him man is a person, because he has a supreme directive power which other beings have not (a). Personality is nothing else than '*liberty*' the term is taken to denote not the liberty of indifference but the liberty to direct oneself according to a superior light. "It is the voluntary activity of man, the reflective activity of enlightened reason, the activity in which he himself is the master of his directive movements, that constitutes his personality; for it is that which invests him with rights and duties. Rights and duties would have had no meanings for him if he were a passive instrument of nature" (b).

The definition of the word 'person' thus being given, the question is to find out whether it cannot be applied to beings other than individual men. The author says it applies equally to groups of persons "provided that as groups they are endowed with the same powers of action as the individuals and have the similar capacity of impressing their powers on the directive movements" (c). He then shows that the moral persons fulfil these conditions, e. g. The corporation as a typical moral person has a free and intelligent

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(a) Conc. d. m. p. 6.

(b) L. c. p. 9.

(c) L. c. p. 13.

power. Take the case of the incorporate Railway companies. The managers representing them have all the directive powers even though the final gain might go to the state. The corporation as a group-body may therefore be said to have personality according to the test applied.

Most of these theories are unsatisfactory from the juridical stand point, because they attempt to prove that group-bodies have a personality comparable to the philosophical personality of human beings. This will not do. Jellinek, with whom Michoud agrees, has well remarked that "it is necessary to separate thoroughly the juridical from the philosophical standpoint". But Jellinek himself has not arrived at the true solution of the problem of juridical personality. He has laid too much stress on 'volition' in the notion of group personality. Taking this volition as an essential element he proceeds to its juridical definition which according to him is different from its philosophical definition. In substance, however, he has substituted a fiction for reality. A passage in the *System der subjectiven öffentlichen Rechte* (p. 28) reads:—"There are, according to viewpoints of observation, different aspects of the same object, similarly the same object may give rise to different notions according to the positions one takes with regard to it; these notions can be identified only by a method

scientifically vicious. For the physiologist and for the psychologist a symphony of Beethoven is the same thing—a ‘succession of movements producing a succession of sensations. For the æsthetician, on the contrary, it is a distinct thing which exists at least in the world of æsthetic sentiments and should be studied as such. It is the same of juridical institutions. The question which is put to the jurist is not whether these institutions exist in the physical world as individual beings, it is asked only how they should be conceived in the world of human relations to which they appertain. Nothing is more dangerous than to confound these two classes of ideas. The methodical ‘syncretism’ is one of the scientific vices of our epoch. The method of the natural sciences, the empirical researches, the biological investigations tell us of sensational discoveries. On the one hand the jurist is reminded that a group-body, not having a head or legs is not a person. On the other the epoch-making discovery is made that the group-body, like the bacilli, the fern, the mammiferi, belongs to a special individualistic category”. The juridical world it must be remembered is not a physical world. It is a world of beings existing in the human thought. These beings although they may result from abstract speculation, although they are abstractions themselves, are none the less real like the mathematical entities. No

one denies the existence of a point, a straight line, nor does one regard them as fictitious, although these can never be seen nor perceived. The jurist has to seek for the juridical and not the physical essence of personality.

Take the case of the state. It has like all corporations two characters. In the first place it is a group of persons regarded as units. The idea of unit in the practical world is a wholly subjective idea: the only real unit is the atom whose existence is mentally admitted. The bodies are composed of different elements which in turn are united in our conception through an abstracting process. In the case of a group-body the common aim is the unit. Just as for the physicist or the chemist there are no chairs, tables, houses, but only wood, metal, stone, so to the jurist the forms of groups do not count but only the aims. In the next place the group forms a person. This notion of personality is purely juridical, which expresses only the capacity of being a subject of rights and duties. If it exists for the benefit of the individual man, it is not in virtue of his nature itself but only in virtue of law and a long historical development. Jellinek like the preceding authors quoted admits that the juristic subject must have a personal volition, but to him this volition appertaining to the group-person is not fictitious. He says "we conceive this volition as a distinct volition in virtue of the

intellectual necessity that compels us to admit the unity of the juristic person. The moment the unity is recognised, all acts should be attributed to the unitary aim of the collective body. These acts will then be in the physical world the acts of individual will but in the jural world the acts of the collective will". This *de facto* personality becomes *de jure* on account of legal recognition.

This theory has the merit of leading us to the juridical domain, its main defects being its great leaning towards a singular volition. It attempts to prove that a group-person has a real will, but the attempt has not succeeded because the demonstration amounts to saying that the group-person has not a real will—but by a natural conception, our mind being constituted as it is, we attribute the mentality of individual men to groups. The partisans of fiction theory say as much and the objections raised against that system equally apply here. I hope you notice that all the theories so far mentioned attempt to explain moral personality by explaining it away. The fictionists openly admit as much, the realists take account of till now—I have not yet come to Gierke-Maitland theory—do but clothe their denial in a vague garb of mentality. The system of these theories may be characterised as the negative system. It is fitting to close the account of this system by a resume of what two

distinguished 'negativists' have to say—I mean Hölder and Binder. But the conceptions of these two jurists differ so much from those of the allied school that Saleilles calls 'them ultra-realists. Let us see what explanation of moral personality or better still juristic personality ultra-realism has to give.

Both Hölder and Binder start from the same point although they arrive at different destinations, rather they have employed the same process to arrive at different conclusions. They have been analytical, they have decomposed the machinery of personality into its separate parts—*dissecta membra*. For Hölder personality even in its juridical aspect is indistinguishable from psychological and ethical personality; for Binder it is only a juridical relation, a manner of conceiving the ensemble of legal relations destined for a particular aim. It will be better to take these two views separately, remembering however that Hölder's is the deeper of the two.

Hölder has adopted what he calls the relativistic notion of personality as I have just told you; juridical personality is identical with ethical personality so much so that the variation in one concept will entail a like variation in the other concept. Juridical personality is not absolutely constant in value, it is susceptible of being increased and diminished. The common law affords an illustration



of this statement, it does not invest an infant, a mad man, a *fême coverte* with the same quantum of legal capacity although it regards them all as persons. This notion of relativity forms an essential feature of Hölder's theory. Binder also agrees in this, but otherwise the two differ. Hölder thinks that man alone can be a person, every other subject of rights is an entity—a juridical entity of a different type. The assimilation of juridical to ethical personality, if carried to its logical conclusion, will lead to the classical Willensthorie because the personality of man being the true juridical personality must connect the latter with intelligence and will. Hölder is then a re-incarnation of Windschied, although he will not admit the fact.

Binder, however, does not adopt the identification of the kind entertained by Hölder. He completes the Iheringian definition of law, which separates the subject from the object of law, by observing that the aim of law is social order. In the conception of personality he has introduced this socialistic element. Now the preservation of social order means the use of force when necessary. This element of power, considered in relation to legal capacity gives rise to notion of personality. The power may be recognised with regard to an individual or an aim and hence juridically speaking there is an individual legal person or a

group-person. This theory then takes no account of volition in the psychological sense and gives a more satisfactory explanation of juridical conditions prevailing in the group relations. But it must be observed that Hölder and Binder have failed to take into consideration the unitary tendency of collective action. The fictionists as well as ultra-realists have made the same mistake. Let us now turn to the present day realists.

The realism as understood by Gierke in Germany and Maitland in England starts by showing that the Bracket Symbol theory of corporations which regards a group body as a grouped body fails as a theory because it cannot account for the essential character of a corporation viz :—its continuous existence disputes the replacement of the constituent members. A better substitute is a theory which is more in accord with the facts. The real-person theory which regards a corporation as a group person with a group-will seems to explain most of the facts of corporation law. I have already explained the position of the realists in the introductory lecture. It may be mentioned here that Maitland thinks “the reason why the Germanic theory is applicable to the English Law is that at bottom the English Law is Germanic Law. Prof. Geldart says. “If we have accepted the fiction theory and concession theory, our acceptance has never

been more than skin deep. For one thing we do not take very seriously the doctrine that a corporation cannot act in its own person, for it has no person<sup>(a)</sup> for our conclusion from that doctrine is that it must appoint an agent, and the appointment of an agent can be hardly described as not being an act." The theoretical ground on which the English practice is based looks then very like the Gierke-Maitland realism.

But one must not suppose that realism has given the quietus to all inconvenient questions. Even in English Law the distance that separates corporate bodies from unincorporate bodies is getting diminished by degrees. Quasi-corporations are in full view. Some have turned to America for a new theory of group-bodies and Prof. Freund has supplied one. It is worth one's while to listen to him. I shall shortly state his position.

The theory of personality has attributed certain physical features to jural bodies, viz :—act will, capacity etc., so that group-persons even according to the realists have formed new species of humanity. Now if this conception of organism be discarded it becomes necessary to analyse the terms corporate will, corporate acting capacity etc.

First as to corporate will. "In its simplest and most obvious meaning this is the personal

(a) *Fergusson v. Wilson*, (1866) 2 ch. 89.

will of the associates acting under the bond of association. This will is the product of mutual personal influence and of the influence of a common purpose, frequently also the result of compromise and submission. Where under the operation of these factors we obtain a unanimous resolution, we may clearly speak of corporate will. But we are also justified in assuming a correct expression of corporate will, where of the associate persons only a portion, representative in number, character and position, act habitually, while the rest sustain a relation of acquiescence, dependance or incapacity. A unanimous expression of the adult male members of a political community may therefore be accepted as embodying the aggregate will.”(a)

How the majority principle may be expressed in terms of the representative principle is further shown by taking the case of the minority actuated by the expectation of individual benefit. The rule laid down in *George v. American Ginning Co.*, 32 L. R. A., 764, that no valid service of process upon a corporation can be had by serving the papers upon one of its officers who himself is plaintiff in the action is well explained by the representative theory. Because where a majority is clearly guided by the common interest while the position of the minority is determined by considerations

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(a) Freund L. C. S. 31.

regarding individual benefit, the corporate will is represented by the majority act as springing from motives which should in reason prompt and determine all the members, while the dissenting members placed themselves beyond the corporate bond and do not disturb the "psychological correctness of the aggregate conclusion." This view must necessarily be taken where the corporation and the corporators are opposed to each other as adverse parties either in internal matters or in juristic relations. The adverse interest of the member precludes him from representing the corporate will. Hence the decision in the American case quoted.

Of course when both majority and minority represent corporate interest a different problem is presented. The question of the proper course to adopt depends in such a case on judgment and expediency. But who should be the judge in these circumstances? The true corporate will would no doubt be expressed by unanimous action resulting from common deliberation and mutual compromise and submission. But law cannot afford to wait. It is not satisfied with vague rules, it says that in like cases the concurrence of the greater portion will determine the course of action. Here again the majority is representative because the will of the majority may be presumed to express correctly what would be the result

of forced unanimity; a similar presumption operates in favour of the will of the quorum against those voluntarily abstaining from action. Here Freund finds an analogy in the law of agency. He observes "In so far as the presumption fails to be correct, it cannot be denied that a will which is not identical with the corporate will is imputed to the corporation, just as we impute the will of the agent to the principal without insisting that it should in all cases accord with the principal's will. The same view must be taken of the acts of other corporate organs; they may likewise be presumed to voice the corporate will correctly, but their will is not the corporate will strictly speaking. There too the imputation of the act to the corporation is justified, because the will of the organ is largely determined by the operation of the bond of association because the consciousness of personal influence and responsibility is similar to that working upon the associates. The policy of the law results, however, in the substitution of a will presumptively according with the corporate will for the will which is actually and undoubtedly corporate"(a).

Again the correct expression of corporate will, it may be said with reason, depends on joint meetings and deliberations of the corporators, although the presumption of accordance

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(a) Loc. cit. p. 54.

with corporate will is as strong where all the associates act separately as where a portion of them act jointly. It is, however, a well settled rule of law that the board of managers while exercising collective power must act in joint meetings. I shall have to tell you something about this in connection with 'quorum and majority' in company law. This rule evidently aims at securing an additional guaranty that the will expressed shall be truly corporate while actual concurrence of all the members may be waived for reasons of expediency. 'Where the public will is expressed by ballot each citizen acts separately; but the constant contact between the members of a political community is a sufficient substitute for joint meetings.' Where the members of a corporation are the only interested parties their separate action is substantially equivalent to corporate action. Thus in *People v. North River Sugar Refining Co.* (a) it was remarked.—"There may be actual corporate conduct which is not formal corporate action, and where that conduct is directed and produced by the whole body both of officers and stock-holders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of corporate character. In equity, however, the corporation can be bound by estoppel or by recognising equitable rights, but where

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(a) 121 N. Y. 582, p. 619.

legal requirements are disregarded an act may be void. The cases which refuse to regard all the shareholders as identical with the corporation mean simply that where rights are held under corporate organisation, the law will insist upon all legal acts being done in the corporate name and not in the name of individual members."

The corporate acting capacity must next be clearly understood in order to find out the correct bearing of the 'Representation Hypothesis.' An act to be recognised as truly corporate should unmistakably bear the impress of collective will and impulse. 'In this sense truly corporate is the act of acclamation, a form of action which can be used only for simple declarations.' Other acts specifically corporate would be difficult to mention although Gierke cites some curious instances of acts designed to be collective; *e. g.*, he mentions a local custom by which, in executing a sentence of death, all the members of the community were required to touch the rope by which the culprit was hanged. (a) It would, however, be narrowing the significance of the term "legal act" if by that is denoted 'physical' act alone. It is sufficient that the will behind the act should be the will of the person whose act is thought of, no matter, whose physical organs are used. Thus the

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(b) Genos II p. 402.



law intends the execution of a will to be the testator's personal act, yet a signature by some other person in his presence and by his express direction is sufficient. The same view may be taken regarding corporate acts. There are indeed some acts which must be performed personally *e. g.*, an oath cannot be taken vicariously. So some crimes are based on specific *mens rea e. g.*, a murder and cannot be committed collectively although the law of conspiracy offers examples of collective criminal intention.

According to the general meaning of legal acts an act is corporate when the will behind it is corporate. A corporate acting capacity in this sense is co-extensive with the corporate willing capacity. As a matter of fact however, the courts have rarely to deal with acts which are corporate even in this extended sense. "What proclaims itself as a corporate act is nearly always an act based upon representative will *i. e.* an act induced by a will which is imputed to the corporation on account of presumptive and probable identity and accordance with what would be actual corporate will. Representative will naturally produces only representative action, and the law does not require more than that in order to bind the corporation. When we speak of corporate acting capacity we have in mind the possibility to be represented in

action and not the mere capacity to give effect to corporate will, and a corporate act therefore becomes simply an act, dictated by proper corporate representation" (a).

Prof. Freund passes on to establish two points as a result of the foregoing analysis; first that an association of persons is capable of producing distinct aggregate conditions with corresponding psychological and practical effects; and second, that the corporate acts and conditions with which the law has to deal are not really corporate but representative. "The aggregate conditions, however, not only necessitate and justify representation, but they also act upon it through the psychological influence of a personal nexus. There is consequently a fair presumption that the representative act truly reflects what would be the corporate will; but the law neither demands the existence of a distinct corporate will, nor actual correspondence between it and the act in every case."

These deductions have given rise to the Representation theory of group-personality. Leaving debatable ground between the real-person and fictitious person theory behind it proceeds to establish itself in a new domain. The tangible and demonstrable facts, according to this conception, require a re-modelling of the notion of aggregate personality. To avoid

mysticism one must, in this view, understand by corporate acts, corporate tort, or corporate notice, nearly in every case, representative acts, torts or notice; the rights and liabilities produced thereby being distinctively collective. The law of corporation is the law of representation.

There is in this theory a strong emphasis on the psychological reality of the influence of collective opinion. In law as in politics the intangible and subtle influences guide an act, but what counts in each is the substantial factor. Moral capacity is generally amongst the incalculable determinants and consequently is irrelevant for legal purposes. It may even lead to error in corporative matters. Because, as the representation theory shows, there is not necessarily a correspondence between a corporate act and corporate will, in other words, a corporation-personality is not always present while a juristic act is being performed by a corporation. The only real element in the concurrent will of the representative body is that the representative will exerts the countable influence. The principle upon which individual rights are exercised must be modified where rights are vested in an association; the principle of the coincidence of discretion and responsibility, of act and liability must yield to the principle of representation.

In a remarkable passage in his lectures on

the legal nature of corporations Prof. Freund explains the true character of corporate unity. I shall quote that passage in full. He says :—  
“ Instead of seeking for an unattainable metaphysical unity, it is far better to enquire in what sense and to what extent the generally accepted idea of the unity of the association as a holder of rights is justified. The truth is that the conception of unity is derived from the operation of individual control in the association, which in its turn is made possible by the influence of personal nexus upon the members. The association becomes visible and active in and through individuals only, but the common purpose, concerted action, and the combined resources, produce upon our mind the impression that the association itself enjoys something like the power of individual personal agency. The resulting conception is not one of absolute unity, such as the German jurists demand, and as to them appears realised in the individual will, but a relative unity, which after all is the most that we can hope to establish. The analogy of composite things explains perfectly the nature of the association. If we treat a house, a ship, a forest, or a mine, as one thing, we do not deny that this thing is composed of many separate or severable parts, each of which may be a thing by itself. But in so far as the connection is operative, the part has no legal existence

except as a part, and does not form an object of separate legal disposition; it shares the legal status of the composite thing, while as soon as the nexus is broken, or only disregarded, it becomes a subject of independent treatment in law. In like manner we treat the association as one, disregarding the separate existence of its members as individuals, in so far as their recognition as such would make the protection of joint interests an impossibility *i.e.*, in so far as it would disturb the conditions of undivided control.....

We treat many as one, because individual differences for the moment are immaterial. We say that A. B. C. D.....N. O. P. Q. R. enter into a legal relation with R, instead of excluding R from the party of the first part, because the difference between A.....Q and A.....R is minimal and may be practically ignored, especially as this practical neglect corresponds with actual adjustments of control and possession and greatly facilitates the operation of legal rules. We say that A.....R are the same as B.....R, because the loss of A and the accession of R are insignificant in view of the continuing nexus operating now and then upon B.....Q. In all these cases we indulge strictly speaking in a fiction, but such fictions based upon the neglect of the irrelevant are very different from fictions which mean the substitution of

an imaginary conception for a substantial nonentity" (a). So the representation theory has attempted to shift the viewpoint to a new position. The substantive reality of group-activity is expressed in the terms of a hypothesis midway between that of a pure fiction on the one hand and that of a pure realism on the other.

Allow me to conclude this summary survey of theories by a short reference to the brilliant essay of Saleilles on the true character of corporate personality.

Saleilles finds that the realists, who handled the fiction theory rather severely, attached themselves to a modified type of *Willenstheorie*. In starting from the subjective basis of rights they asserted that the volition that entitled a group-body to be regarded as a person was autonomous volition distinct from the social supremacy, while the pure *Willenstheorie* supposed the volition to be identified in a way with the legal right. In fact according to the latter a legal right was a legal power of willing. But the modification through the recognition of a collective volition led to the puzzling hypothesis of collective organism. The organic theory attempted to explain the personality of a group through analogical similarity between a living organism and an association. This

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(a) L. c. p. 78.

was responsible for fresh juridical errors. Gierke was the first to explain realism by the better logic of facts. Although his language savours of 'organic' notion, it is not the organic hypothesis of the old school that he has set up. He never asserts that the organism constituted by the 'organised collectivity' is identical with a 'human organism.' For him it is sufficient, as I have told you before, that there should be a collective will to which the consequences of law might be attributed; and no one doubts that group-activity presents instances of such will. This collective will is the principle of corporate reality. The corporation is a real person from the juristic standpoint because it possesses all the elements of reality, an exterior organ for willing and acting, a collective will which is, unlike the will in Zittlemann's hypothesis, inherent in the group itself.

For a long time Saleilles himself was under the influence of this modified organic theory of juristic personality. He says "I was strongly touched by this hypothesis which had a long sway over me." He met the objection of the absence of free will and conscience in an association by replying that with each associate there is an orientation of will which leads to the attainment of the common aim. The associates tend to *intend* the same thing.

Of course they may wish to realise the common purpose in different ways, yet the identity of aim leads, at least ideally, to the identical process. It is this common volition that is disengaged and made manifest in corporate actions. According to this analysis the new realistic theory may be called the theory of "dispersed collective will."<sup>(a)</sup> But Saleilles is not the man to be contented with superficial similarity. In a masterly analysis of the juridical notion of rights he has gone deep into the fundamental question regarding the relation between a concept and a juridical nexus. According to his latest researches, a proper comprehension of this relation is the true means of realising the sense of corporative reality.

"All the theories of juristic personality rest on a double foundation—the concept and the juridical relation. The persistent implication is that a legal right is not a reality of the material order, but a concept of the mind, a relation which the mind establishes between a reality of the external order and the objects present to the mind. And personality is likewise notional, a relation established by the mind between a mental reality and the attributes called rights applicable to it." If a right is a relation conceived and established by the mind, it may be supposed that a

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(a) Saleilles *Op. cit.* p. 528.



relation of this kind may be established for any entity. An animal may be a person, a tree may be a person. So it is necessary to go a step further. Mere notional relationship will not do, something else is required for reality of rights. This further test is supplied by juridical relation. For the establishment of the legal relation it is essential that the beneficiary should be capable of willing. But a conceptual element must all the while be present. The juridical reality means then a relation which is established in a way by itself, "through the adaptation of the general principles of law to the reality without the presence of a convention, a statute or custom" (a). It is in this sense that the personality of a man is juridically real and it is in this sense that the personality of a corporation is real."

I think this is as much as we want in the way of theories. You may ask, what is the attitude of Indian law towards the real person theory? In answer to this I can only repeat what I have said at the close of the introductory lecture. Time is not yet ripe for a theory of Indian corporations. Our law is still in its infancy and the only guide for us at present is the English law and sometimes the American law. The present course, I hope, will make clear the observations made. Let us now pass on to the solid grounds of facts.

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(a) L. c. p. 605.

## NOTES TO LECTURE II.

1. The student of the Realistic theory of Corporations may with advantage consult Gierke's *Deutsches Privatrecht*, Vol. I., third title § 62. The historian of the law of Corporations in Germany remarks, while pointing out the influence of theory on practice that the notion of corporation in Germany appears outwardly clothed in Roman dress but essentially differs from that of the *Universitas* in Rome. The *Roman Universitas* never lost sight of the *Singuli* although a group-person was constantly knocking at the gate; the modern law on the other hand distinctly admits the reality of a 'corporative person' (the group-person). "Die deutsche Körperschaft ist als reale Gesamtperson das von den verbundenen Einzelpersonen getragene und ihnen zugehörige Gemeinwesen" (*Deut Privatrecht*, Vol. I. p. 479).

2. For a comprehensive account and a thorough review of the theories touched upon in the last lecture consult the following;—Thöl—*Volksrecht*. (1846). Roth—*Zur Lehre von der Genossenschaft*, Gierke—*Genossenschaftstheorie*, p. 23 et seq.

3. In view of the fact that writers have often failed to emphasize the distinguishing feature of the Zitelmann—Gierke concept it may not be superfluous to add that the entity

idea has been 'held responsible for the origin and growth of incidents of the group-form of private enterprise which really are not at all necessary, nor historically referable thereto' (Kuhn—Law of Corporations p. 26).

4. Kuhn has quoted, on page 27 of his study, Davis in support of the statement that the will of the group-person represents the collective will of the members of the group, hence the responsibility of the individual members for a corporate act. According to the Romanists such as Klingmüller the capacity of the corporation to act and to be made responsible is referable to the will of the legislator.

5. For some legal ideas connected with the Group-forms in the middle ages consult Vinogradoff—Roman Law in Mediæval Europe.

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## LECTURE III.

### Corporations—General Principles.

The part that the theory of personality has played in the development of corporative ideas has already been noticed. From the individual figuring as a person to the group assimilating to itself the essential qualities of personality is a long stretch. You have noticed how the Roman idea crystallized in course of centuries, how the Teutonic peoples became familiar with the most important and the most subtle legal ideas. The present lecture is devoted to the definitions, nature and classification of corporations. And I may tell you at the outset that I have adopted a historico-comparative standpoint in order to explain many of the practical rules which otherwise would appear anomalous and exceptional.

All writers on corporation have laid stress on the corporateness of this legal entity. Coke in his famous treatise on Littleton calls the corporation "a Body to take in succession, framed as to that capacity by policy."<sup>(a)</sup> So early as 1691 it was laid down in Smith's case that a corporation is an artificial body composed of divers constituent members like the human body and that the ligaments of this body

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(a) Co-Litt. § 413

politic or artificial body are the franchises and liberties thereof which bind and unite all its members together and the whole frame and essence of the corporation consist therein. Lord Holt said: "A corporation is an ens civil, corpus politicum, a collegium, an universitas, a jus habendi et agendi." These definitions agree in concentrating attention on the "bodiliness," so to say, of a corporation. The famous English writer on Common Law—Blackstone—called the corporations "bodies corporate or bodies politic." The underlying idea is that it is necessary for certain purposes to maintain a continuity of rights and duties; and as all personal rights die with the natural persons the state, instead of adopting the inconvenient device of investing a series of individuals one after the other with rights and duties, has thought it better to constitute artificial or juridical persons. These latter have a corporateness, a bodiliness, quite distinct in the eye of law from the bodiliness of constituent individuals. Following Marshall we may describe a corporation in general as a body or artificial person consisting of one or more individuals, or sometimes of individuals and other corporations created by law and invested by the law with certain legal capacities. Here it is important to refer once more to the theories already discussed in the earlier lectures. The real-person theory, as I have already pointed

out to you has had a tough battle to fight with the artificial-person theory. Even some of the modern writers would persist in calling a corporation a group that has a legal existence distinct from its members only by a fiction of law.<sup>(a)</sup> But we may note that for our purposes it would be better to follow Dr. Gierke and say that a corporation has a bodiliness not by a fiction of law but from the nature of things. It is a legal as opposed to a physical entity in which the existence of natural persons who compose it is merged. The only fact to be borne in mind is that the corporation gets its corporateness from the legal sovereign. Thus any number of individuals may agree to carry out any lawful object, they may hold property in common, enter into contracts with other individuals or groups, yet such an association would not be a corporation. The law does not regard it as a distinct entity, individualised and separated from the group. In other words an association, in general, is not a group-person. If the associates appoint an agent, the agent is the agent of all the associates taken distributively. An action on a contract by the agent on behalf of the associates must be brought against all the associates however numerous they may be. Any divestitive act must be done by the associates individually. Thus when they convey

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(a) Morawetz—On Corporations.

away property they must execute the conveyance as individuals. So an investitive act affects the associates individually e.g. on taking a conveyance the associates become tenants in common, there is no survivorship on death, and individual associates may alienate their shares without affecting the nature of the common property. But all this changes when the group is incorporated. The individuals are still there but the collection has assumed a new importance. In the eye of law, by the fact of incorporation, a new entity has come into being for playing all necessary parts in juridical life—for holding property, for making contracts, for suing and being sued. When the associates are incorporated or consolidated into a group-person the change effected is of a fundamental character. The group becomes one person. The incorporated associates have, as Blackstone remarks, “one will which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of Municipal Laws of this little republic; or rules and statutes may be prescribed to it at its creation which are then in the place of natural laws: the privileges and immunities, the estates and possessions of the corporation when once vested in them will be for ever vested, without any new conveyance to new successors; for all the individual

members, that have existed from the foundation to the present time or that shall hereafter exist, are but one person in law, a person that never dies in like manner as the river Thames is still the same river though the parts which compose it are changing every instant.”(a)

As already stated the characteristic that stands out among all other characteristics of a corporation, in fact the very essence of it is its personality. Kyd says “a corporation is a collection of many individuals, united into one body, under a special denomination, having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting, in several respects, as an individual” (b). It is this personality that marks out a corporation from a non-corporate group. This point is emphasised in the famous case of *Trustees of Dartmouth College v. Woodward*. There Chief Justice Marshall remarked “Among the most important properties of a corporation are immortality and if the expression may be allowed, the individuality; properties by which a perpetual succession of many persons are considered as the same and may act as a single individual.” I must repeat that it is this individuality that makes a corporation something more than a mere collectivity.

(a) Blackstone—Commentaries.

(b) Kyd—on Corporations Vol. I.



So far I have dwelt on the individual or rather the personal aspect of a corporation, but I must add that quite recently the social side of a corporation has been emphasised by the American jurists (a). It may be worth our while to examine this new development of corporative idea.

The individuality of a group is fully developed in social activity. The effect of social relations is a product of two factors—the content of the human activity and the form within which it exists. The two factors are not isolated; to use a mathematical term, there is a functional relation between them. This relation becomes clear, as Davis has shown, on a general survey of the nature of corporations. The following characteristics appear to be essential for all corporations :—

(a) The fundamental feature of associate activity as distinguished from individual activity is that a connection is established in group-activity between the individual members and other social groups. That is why the theoretical distinction between a corporation sole—a one-man group (if a contradiction in terms be allowed) and a corporation aggregate—a group-person—has been avoided in practice. In most of the modern legal systems the corporation sole occupies a very small space. True there are some remnants of the old

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(a) Taylor—on Corporation, Chapter I.

idea in English as well as in Indian law but the corporation sole of the present day is regarded as an anomaly though there might have been some justification for the idea when it first arose. The corporation aggregate has so much prevailed over its annexé in America that with the possible exception of church parsons in Massachusetts there are no corporations sole in the United States (a). The group when individualised establishes a permanent relation with other groups. The fundamental trait that distinguishes a corporation from other associations is the presence of a cementing force but for which the group-person would be pulverized into grouped persons. The grouping helps social activity. The mere holding of property for particular public purposes with incapacity to use it for other purposes, although one of the characteristics of a corporation, is not its essential characteristic.

(b) The second consideration that presents itself in this connection is the birth of a corporation. The State is directly interested in corporate activity and hence the relation subsisting between one group and another group and that of the members *inter se* is mediately or immediately determined by the State. Whether the relations should be regular or exceptional would depend on the character of the legal system prevailing in a country. In

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(a) Cooley on Blackstone Bk. I. page 468.

Imperial Rome as well as in Europe and America the general law uses the individual as a unit and consequently the group relations form subjects of exceptional law. In India so far as pre-British Hindu Law is concerned the unit was a family and the group relations were of the same formal type as the individual relations. Whatever may be the form the State either creates it or maintains it.

(c) The third point to notice is the voluntary acceptance of membership as distinguished from the compulsory status of citizens. One may say "you cannot help being a citizen of one or other state but you can help being a corporator." The only objection to this statement may arise in connection with public corporations like municipalities, because it is a settled rule that the consent of the citizens of a municipality is not necessary to its incorporation and the acceptance by them of a municipal charter is not necessary to make its provisions operative, but the tendency towards the conversion of the municipalities into sub-governmental departments renders the objection nugatory. In England as well as in America and India, municipal self-government is being rapidly transformed into a mere determination within narrower limits of the means of executing the general laws of the country. The increased interference by the legislature in the government of municipalities is an instance in

point. (a) Membership of a corporate group is always voluntary, but once a member, the rights and duties of a member as a corporator are compulsorily maintained so long as the corporation lasts.

(d) The fourth point is the autonomy of the corporate group; within the limits set by the law its power is supreme; it can do all it likes so long as the acts are *intra vires*. It is autonomous. Not only is this autonomy self-regarding, it is also extra-regarding. In other words the group being self-sufficient may add to its number and renew its members if need arises. This characteristic has been all important from historical, social, and legal stand-points. It may be said to be the counter-part of personal liberty in group bodies.

These general considerations enable one to describe a corporation as "a body of persons upon whom the State has conferred such voluntarily accepted but compulsorily maintained relations to one another and to all others that as an autonomous self-sufficient and self-renewing body they may determine and enforce their common will and in the pursuit of their private interest may exercise more efficiently social functions both specifically conducive to public welfare and

(a) Cf.—The Calcutta Municipal Act, The Bombay Municipal Act, and The Madras Municipal Act.

most appropriately exercised by associated persons.”(a)

Here the popular idea of group activity has however been given a prominence. But a closer examination of the legal rules governing corporate acts leaves no doubt that juridically considered individual rather than the social aspect of a corporation is of greater moment. The following examples will make this point clear :—

(1) Contracts: One of the essentials of a contract, as you know, is plurality of parties. There should be at least two individuals to form a contract. Now if we find that a contract is possible between a corporation and the corporators we must conclude that the corporation is an individual distinct from sum of the corporators, that is to say, distinct from the corporators taken collectively. In an English Case *Foster v. Commissioners of Inland Revenue* (b)—it was definitely laid down that the dictum that a person cannot contract with himself did not apply to a contract between a corporation and its members. We may take *Farrar v. Farrars Limited* (c) in this connection. Mr. John Riley Farrar was a solicitor, he was one of the three mortgagees in possession. He acted for the mortgagees and sold under the powers of sale

(a) Davis—Corporations their Origin & Development.

(b) (1894) 1 Q. B. 516.

(c) 40 C. D. 395.

in their mortgage deed to a company more or less promoted by himself. He was the solicitor of the company and had a substantial interest in it as a share-holder. Action was brought by mortgagors to set aside the sale by the mortgagees. One of the grounds relied on was that the sale was invalid because it was in substance a sale by a mortgagee to himself and others under the guise of a sale to a limited company. Lindley L. J. remarked "If this proposition were true the sale could not stand as against the mortgagor. It is perfectly well-settled that a mortgagee with a power of sale cannot sell to himself either alone or with others nor to a trustee for himself. A sale by a person to himself is no sale at all. But a sale by a person to a corporation of which he is a member is not either in form or in substance, a sale by a person to himself. To hold that it is would be to ignore the principle which lies at the root of the legal idea of a corporate body, and that idea is that the corporate body is distinct from the persons composing it. A sale by a member of a corporation to the corporation itself is in every sense a sale valid in equity as well as at law." A group-body is an entity distinct from the body of a group.

(2) Agency :—The principles of Agency is *Qui facit per alium facit per se*. The Agent is a representative of the principal. The liability for acts done by an authorized agent extends

under certain circumstances beyond the agent and reaches the principal. The principle of agency supplies an instrument whereby it is possible to test the presence or absence of a person. In the case of a corporation the application of the test just mentioned brings out sufficiently the personality of the former. Suppose a joint stock company employs an agent to buy some lands on the company's behalf and the contract of sale is completed but the agent misappropriates the money to be paid to the seller. The seller can bring an action for recovery of the sale price not only against the agent but also against the company as a corporation, although not against the share-holders of the company individually. Because the agent in this case is the agent not of the individuals who composed the corporation but of the corporation itself. The corporation is liable as a principal just as a natural person would in a like case have been liable as a principal. Connected with this principle is the rule that a contract by the individual members of a corporation, not as agents but as individuals is not a contract by the corporation itself unless subsequently ratified (a). This then is another indication that as a person a corporation is distinct from the corporators.

(a) *Smith v. Hurd*, 12 Mete; *Faulkner v. Lowe*, 2 Exch. 595. Cf. Order XXIX Code of Civil Procedure (Indian). A foreign corporation can claim the benefit of this rule. *Singer Manufacturing Co. v. Baijnath*, 30 C. 103. See also *Delhi and London Bank v. Oldham*, 20 I. A. 139. *Sreenath v. E. I. Ry. Co.* (22 C. 268.)

(3) Partnership *v.* Corporation—The distinction between a partnership and a corporation well illustrates the nature of corporate bodies. A partnership has not legal existence apart from that of the partners. “A one-man partnership is an impossibility but a one-man company, although a subject of judicial strictures, is a perfectly definite legal entity.” A company where all the share-holders except one are mere *dummies* is nevertheless a distinct person from the one-man who virtually holds all shares. So in *Broderip Saloman* (a) Aron Saloman a leather merchant wanted to convert his business into a limited trading company. A limited company was eventually formed but the memorandum of association was subscribed by Aron Salomon and his wife and daughter and his four sons. No one else ever had a share in the company. The company however did not prosper and liquidation followed. Now a question arose as to whether debentures issued by a one-man company to its only real member should be allowed to have a preference over the *bona fide* unsecured creditors of the firm. In the lower courts it was held as Saloman was identical with Saloman & Co., he must be regarded as a trustee of his interest for the company and its *bona fide* creditors. In the House of Lords a more technical view was taken.

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(a) (1897) A. C. 22.



The decision of the lower courts was reversed on the ground that a corporation in all cases possessed a distinct personality from its members and therefore could contract freely with any member irrespective of the fact that he might have in it property and irrespective of the control he might exercise over its affairs. Lord Macnaghten said "there is nothing in the Act requiring that subscribers to the memorandum should be independent or unconnected, or that they or any of them should take a substantial interest in the undertaking, or that they should have a mind and will of their own, or that there should be anything like balance of power in the constitution of the company. The company is not in law the Agent of the subscribers or trustee for them. The difference between a corporate and an incorporate body is illustrated by *Foster and Sons Limited v. Commissioners of Inland Revenue*. (a) There a partnership firm transformed its business into a limited liability company. The identity of members, who were the relatives, remained as before, and the usual form was adopted of a sale by the partners to the new company, the consideration being expressed in fully paid up-shares. Upon this transaction the Inland Revenue Authorities claimed the duty payable upon a sale, arguing

(a) (1894) 1 Q. B. 516. See Carr on Corporations from which the above is quoted.

that there had been a transfer of property from certain persons to another person ; this person, they said, was quite distinct in law from the vendors, and the fact that the former partners were the only corporators of the new company was irrelevant. Upon the other side it was argued that the sale was purely nominal and that since there had been no real transfer of any beneficial interest no duty was payable. It was held however that the view of the Commissioners was correct. Partners are not comparable to corporators because while the latter crystallize into a corporate individual the former always remain an amorphous body.

(4) Acquisition of Property :—When a corporation takes a conveyance to itself or otherwise acquires property, the title to the property belongs to it as a corporation. The person of inherence is the group person and not the group of persons. In *Reg v. Arnaud* (a) the Customs House Officers refused to register a vessel belonging to a British Corporation because some of the share-holders were foreigners and by the Merchant Shipping Acts ships belonging to the British subjects alone could be registered. A Mandamus was taken out by the company to compel registration. In course of proceedings on the Mandamus Denman C. J. said “The individual members of the corporation, no doubt, are interested

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(a) 16 L. J. Q. B. (N. S.) 50.

in one sense in the property of the corporation, as they may derive individual benefit from its increase or loss from its destruction but in no legal sense are the individual members the owners." So the objection to the registration was not valid and the customs officers were ordered to register the vessel. (a)

(5) Alienation and Mortgage :—When property is conveyed by a corporation or a charge is created on corporate property the dispositive acts are to be done in the corporate name. Thus if a mortgage is executed by the corporators in their individual names, although all may join, and although they all may intend to bind the corporation, such a mortgage is not a valid legal incumbrance on the corporate property. (b) The reason is that the sum of the parts is not equal to the whole so far as the personality of a corporation is concerned. Once more because one can never emphasize the point too strongly, a corporation is not a mere aggregate of the shareholders, it is a person distinct from the corporators. The group has, by the act of incorporation been metamorphosed into a legal person. Flitcroft's case (c) is instructive on the point. Here the directors a limited company paid away a part of the capital of

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(a) Carr—L. C. See also Smith—Corporation ; Marshall—Corporation.

(b) *Bundy v. Ophir Iron Co.*, 38 St.

(c) 21 C. D. 535.

the company for purposes not authorised by the memorandum or the articles of association. The question arose whether there was a breach of trust. It happened that the shareholders had ratified the act of the directors. It was argued that there was no breach of trust. But the fact was that the shareholders had not the full knowledge of all the particulars ; and Brett, L. J. said "If they had with full knowledge assumed to ratify what was done," they could not individually have complained, but the shareholders are not the corporation. Even if the shareholders had all sanctioned what was done and had remained the same throughout, still the company could have sued the directors for a breach of trust. They are trustees for the company, not for the individual shareholders.

(6) Liability for debts :—The principle of corporate liability in the case of debts incurred by a corporation is a further illustration of the individuality of a corporate body. In common law when persons unite together for the purpose of making profits they are all liable for the debts of the association during the time that they are members, and in case of a dissolution, past members must pay their share of debts as well. All this entirely changes where a corporation is concerned. If a man trusts a corporation he must look to its assets for payment of debts due to him, he cannot, apart from statute or a

division of juristic persons into two categories :  
 --(1) the corporations where juridical person is born out of a union of a number of individuals ; and (2) the endowments where the juridical person is not apparently visible, its existence is rather ideal and rests on the object that it has in view.(a) In this sense an endowment is a person in private law. Moreover it may be noticed in passing that corporations and endowments although figuring as distinct types of juridical persons, have one feature in common so far as the doctrine of Savigny is concerned—the fiction shared by both, although the fiction in the case of a corporation is connected with an ideal assembly while in the case of an endowment it rests on “an abstraction personified, a humanitarian work to be accomplished in a certain place, in a certain mode and in a determinate way.”(b)

This distinction although classical in Continental systems has however a limited application to English and Indian systems now that various statutes have rendered unnecessary a theoretical discussion of the nature of endowments. Some critical remarks, nevertheless, must be made in order that the most essential traits of a corporation may be firmly seized.

Without entering into the minute details,

(a) Savigny—Das Rom. Recht. II. p. 240.

(b) Savigny—loc. cit. p. 242. Cf : Gierke—Deutsches Privatrecht § 78. Heise—Civil Rechts § 98.

let us enquire wherein lies the distinction noted. On a general survey an endowment as well as a corporation has for substratum a real human group, but the group in the former case is made up of the destinatories *i.e.* of those for whose benefit the endowment is created. It is in them that the primary and the principal character of subjective right rests, they are the individuals whose interest is protected by law. As to the other element connected with the exercise of a right, namely, the will, there is this distinction between a corporation and endowment that unlike the will of a corporation the will does not reside in the group interested, moreover, the will to be exercised is directed by the will of the founder of an establishment. So this distinction between a corporation and an endowment may be summed up after Michoud as follows :—

In a corporation the interest-element and the will-element are in union, it is the same group of the interested that forms the organisation destined to bring forth the collective will, while in an endowment the two are distinct, they are joined by a volition external to the group. Thus Gierke remarks—"the will in an endowment is transcendental and not immanent, it is impressed from without and does not spring from within. (a)

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(a) Gierke—*Genossenschaftslehre* pp. 12 & 13

The substratum of an endowment is, in this view, the collective group. The organism, as Ihering remarks, such as has sprung from the will of the founder constitutes also an essential element, for it is designed to represent the group of the interested in a manner conforming to the wishes of the founder. (a) Thus in the case of a charitable endowment it is not enough to remark that the endowment is directed merely to the satisfaction of the wants of a class of people but the essential point is to note how those wants are satisfied. This subject is of vital importance in countries where the juristic personality of endowments has not been formulated by legislation.

The theory of endowment that has been touched upon so far is radically different from those others that refuse to see in an endowment a group of human beings or assign no importance to such a group, the various types of fiction-theory whether the fiction personifies the aim of an endowment or the patrimony which forms the available fund. This theory is likewise different from those that attempt to deduce the personality of endowments from that of the state or of the municipality. (b)

You will observe that an endowment as a juristic person has features easily distinguishable

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(a) Ihering—loc. cit Vol. III pp. 56-57.

(b) Brinz—Pandekten T. I. § 60 Zitelmann—Jur. Personen p. 27

from those of a corporation. In a corporation the two elements of subjective right fall in the hands of the same group, those of the corporators; in an endowment they are separated through the will of the founder. "This will has been manifested at the very beginning, since the creation of the moral person, once for all; and so long as the endowment subsists it produces juridical effects, it binds together the successive administrators of the endowment; it determines for a period longer than the life of the founder and practically for an indefinite period the destination of the funds." (a)

So far I have discussed the distinction between the different classes of juristic persons in private law. Let us now proceed to find out how far such distinctions occur in public law. No one doubts that in the domain of public law corporative as well as 'foundative' elements are present. The sovereign state democratically organised presents all the elements of a corporation; it is a human group which itself determines all its aims and which administers them as it wills. In the case of an autonomus municipality the same observation applies, the public charities established by the state present the characteristics of a private endowment.

(a) Michoud—loc. cit. p. 187.



One may remark at the start that much will be uncertain and shifting in the domain of public law so far as the juristic persons above-noticed are concerned. Thus the foundative elements of the state may not necessarily have the complete directive powers. So Gierke has classified the states as the *endowment-states* (*anstaltstaat*) where the state is subject to a directive power and the *corporation-states* (*corperschaftsstaat*) where the state manifests the highest corporative ideas. Similarly municipalities may be divided into two classes—the endowment-municipalities where the corporative element is not supreme and the corporation-municipalities where all the marks of a corporation are present.

The preceding explanations help us in classifying juridical persons even in doubtful cases. One or two illustrations will make this point clear. A famous French jurist has shown how public endowments may be classed into those that are administered by the state in its public capacity and into those that share with private corporations their fundamental characteristics. From this standpoint religious congregations, syndical associations and partnerships fall into a class distinct from that occupied by the state, municipalities, charity boards with corporative powers. (a) The

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(a) Hanrion—Droit administr. p. 698.

distinction between the two classes rests on the fact that in the case of the non-corporative groups such as religious bodies the juridical capacity is transcendent, while in the case of the rest it is immanent.

Now we come to the celebrated distinction between the public and the private juristic persons. Under the first head fall the state, the municipalities and the public boards. It is not difficult to see that the state occupies a class by itself. It has been settled with one accord that the state as a moral person is distinct from the collection of individuals forming the population. As regards public boards there is some difference of opinion. Some would deny corporative character to public boards. But this is going too far in the negative direction, as the history of juridical systems clearly shows. It would take us far into the history of associations if we attempt a detailed study of various types of public juristic persons. Any one interested in the subject cannot find a better guide than Michoud.

Let us now consider the distinctive features of a corporation in the light of the remarks already made. A corporation as a juristic person has a name, certain capacities, incapacities and, in general terms, all the attributes that give birth to legal personality.

(1) The name of a corporation.—A corporation must have a name. Here an analogy

with the natural legal person is evident. As A and B serve to identify the persons called A and B so the name of a corporation is its specificatory mark. The name however is an *essentialia* and not an *accidentalium* in this case. The law requires that the name should be either expressed or implied from the nature of the corporation. Thus in England when the king incorporates the inhabitants of a particular place with the power to choose a Mayor annually, the incorporation implies that such a corporation is named after the Mayor and the commonalty of the particular place.(a) The name may be given by the charter of creation. The name once given is unchangeable except by a fresh charter or an Act of Parliament.(b) This rule prevailed in Roman Law and still prevails in all modern countries. Thus the Indian Companies Act, the German Civil Code and the English Companies Act have made it a specific rule that a name once given to a company cannot be changed unless a new company is formed with the same members of the old company. A corporation may, however, have different names, *e.g.* one name by grant, another by prescription ; but it cannot have two names by two different grants,(c) nor can a

(a) *College of Physicians v. Salmon*. (1701) Holt, 171.

(b) 6 Vin. Abrid, 261. In re Sheffield Insurance Co. Q.B.T.T. 1847.

(c) *Knight v. Mayor etc. of Wells* (1696) 1 Ld. Raym. 80.

modern corporation change its name by prescription.(a) The name need not be connected with a definite place except when it is so required by a statute. At one time it was supposed that a body incorporated by the name of a place should speak the geographical truth, because then the idea prevailed that locality was of the essence of a corporation (b) the reason being that most of the corporations then known were either municipal or entrusted with local government. But with the growth of trading corporations, corporations unconnected with the administration of justice and holding lands, the old theory has given place to the new one that locality is an accident of a corporation. A name, therefore, need not be, in general, the name of a definite place.(c) The name is to serve as a distinguishing mark and as such any sign sufficient for identification and legal acts will do.

A corporation does all corporate acts under its name. When it has changed its name it should use its old name for prescription down to the time of the change and the new name thenceforward. But all actions for rights accruing due either before or after the change are to be brought in the new name.(d) The

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(a) *R. v. Harghley* (1833) 1 New M. (K.B.) 525.

(b) *Button v. Wrightman*. Cro. Eliz. 338.

(c) *Pilbrow v. Pilbrow's Atmospheric Railway Co.* 4 D. & L. 450.

(d) *A. G. v. Farnham Town*, (1669) Hard 504. *Colchester Corporation v. Seaber* (1776) 3 Burr. 1866, 1873.

reason for keeping to the old name for a time for the purposes of prescription is obvious. For prescription, as you know, a continuity of possession is necessary. The possession, however, need not be continued by the same individual, a successor may add to his own possession that of his predecessor in title. In the case of a corporation prescribing under two different names it may be supposed that one is the successor of another and hence the rule with regard to the old and new names. But in the case of actions it is not necessary to make use of different names because the corporation may sue in its new name just as an heir may sue in his own name for rights accruing due to his ancestor.

That the name is a distinguishing mark is conclusively shown by the rule about misnomer in grants to a corporation : a grant to a corporation in a wrong name is bad unless the name is sufficient to show the intention of the grantor and mark out the grantee. Thus in *A. G. v. Rye Corporation* (a) a devise of lands to the Right Worshipfull the Mayor, jurats and Town Council of Rye was regarded as sufficient to pass the land to the Corporation of Rye, whose correct name was the Mayor, jurats and Commonalty of Rye, the *ratio decidendi* being the purpose that the name of a corporation is to serve. The name is to distinguish one

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(a) 1817, 1 Moore C P. 267

corporation from another and as in this case it became quite clear which corporation was meant although the name as given in the testament was not accurate, all that the name was wanted for had been fulfilled. The name is a *nomen*, a mark and nothing else.

(2) Domicil—Before the advent of trading corporations, domicil was regarded as an *essentialia* of a corporation. It had to belong to a definite locality. But in modern times, although a domicil is necessary for the management and the direction of business, it is immaterial whether the whole of its property is situate in one place or in different places. Under the English law if the business is carried on in England the corporation is regarded as domestic, if outside England foreign. The domicil may then serve as a *differentia* for separating the foreign from domestic corporations in some legal systems. In Indian law, the Companies Act provides that a company governed by its provisions should be localized in India. Domicil may now be regarded as an *accidentalialia* of a corporation.

(3) Capacities of a corporation :—

(a) Perpetual succession—When once a corporation is created and property transferred to it, it continues to hold the property in its own name so long as it exists and so long there has not been a corporate alienation. In the

case of a corporation sole, the successor in title succeeds to the property. Thus the King in England is by common law a corporation sole with the capacity of succession. On the death of a king the properties, rights etc. pass to the next king and there is no interregnum. So also on the death of a parson, who is a corporation sole in English law, the property of the parish would go to his next successor in title and not to his heirs or personal representatives. A similar remark applies to the manager of the property of a Hindu idol.<sup>(a)</sup> In the case of a corporation aggregate, this capacity to have perpetual succession renders many transactions, where a continuity of persons of inherence or incidence is necessary, possible. Thus companies may venture on enterprises without any danger of these falling through on account of death or withdrawal of the members who form a company. The continuity of a corporation in any individual case is comparable to the formal persistence in natural phenomena. "The river Thames is the

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(a) *Rajah Varmah Valia v. Ravi Varmah Mutha*, (1876) L. R. 4 I. A. 76 (81).

same river although the individual particles of water composing it are continually changing.”(a) It is this continuity of type that led Coke to apply the conception of immortality to a corporation. A parallelism may be instituted roughly between the legal immortality of a corporation and the physical immortality of some protozoa. The amoeba is zoologically speaking immortal, for the successive descendants of an amoeba are but the part of the ancestor. It lives in its progeny and dies generally an accidental death. So a corporation not of course immortal *a parte ante* may become so *a parte post* so far as the period of its duration is concerned. It may be brought to an end for some default and the instances are not rare where only a limited lease of life was granted to a corporation. But so long as the corporation has not committed any default it continues throughout its period of duration as one and the same corporation notwithstanding the changes in the personnel of the group. The Roman maxim *personae*

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(a) Blackstone, Commentaries Vol. I p. 473 etc.



*vice fungitur* cannot have a better application. The corporation is acting as an individual and it will act always as one and the same individual. This explains the rule that "the aggregate of corporators cannot take lands by their corporate name as an aggregate body, to them and the heirs of each of them, but to them and their successors in the corporation." (a) Thus follows necessarily the consequence that corporators may elect, if they like, members in the place of such as have retired or died. (b)

- (b) To sue or be sued by its name—This incident is again a direct consequence of the personality of a corporation. You know the plaintiff or the defendant figures as such in a law court because in the one case he is the person of inherence and in the other case he is the person of incidence. As soon as the corporate idea became definite and certain the corporation *qua* corporation came to have a *locus standi* before a law court. Even the Canon Law recognized the rule that whatever was owed to a corporation was

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(a) Grant—On Corporations p. 626.

(b) 1 Roll, Abr. 514.

not owed to the corporators nor what the corporation owed did the individual corporators owe. Here was foreshadowed the principle of corporate liability already mentioned and the capacity to sue or to be sued is only an offshoot of that principle. Thus A, B and Company Ltd., must sue as such and not as A and B and the other shareholders named specifically. With respect to suits in Equity, however, the English practice has been to allow corporations, in some cases, to maintain proceedings in the names of individual corporators. So Grant remarks "In Equity a suit may be instituted either in the names of all the members or in the name of the corporation." (a) But it must be noticed that this exceptional procedure in Equity does not in any way touch the fundamental conception regarding the personality of a corporation. The individual corporators may be considered agents of the corporation for some purposes and as agents they may sue alternatively instead of the principal suing. In fact for

(a) Grant—on Corporations, p. 199.

practical reasons it has frequently been the custom to maintain suits in common law as well as in Equity in corporate names because then the death or resignation of a member does not affect the proceedings. Again both in England and in India a limited company is by statute law allowed to sue and to be sued in its corporate name.

- (c) To purchase land—The power to acquire and alienate both real and personal property is an implied characteristic of many corporate bodies. Thus a limited company for the purchase of real property is from the nature of the case competent to acquire land. But sometimes a corporation may be expressly prevented from acquiring land and no corporations are allowed to acquire lands for purposes foreign to the object of such a corporation. Therefore the power to purchase lands though an incident to a corporation is not an essential characteristic.(a)

- (d) Common Seal:—An act in order that it may appear as a corporate

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(a) *Thomas v. Dakin*, 22 Wend (N. Y.)

act has generally to be evident by a corporate sign. A common seal therefore will be needed for acts of a corporation aggregate. A corporation sole however does not need a common seal. The reason is that in the case of a corporation sole the individual who stands as a representative of the corporation is competent to testify to all that the corporation sole has agreed to do or is going to do. But the same argument does not apply to a corporation aggregate because the resolution of all the members is not the resolution of the corporation since the latter has in the eyes of the law an existence distinct from that of the former. A common seal is then an incident although not an essential one of corporateness. There are certain acts however which always require the common seal. The most important of these, according to Grant<sup>(a)</sup> are—(1) making a feoffment, (2) a demise, (3) granting a license, (4) accepting a demise, (5) surrendering, by express surrender, a lease for years, (6) presenting to a benefice,

(a) Grant—On Corporations, p. 56.

(7) commanding their bailiff to enter for condition broken, (8) or into lands purchased, (9) or to seize goods forfeited under a custom, (10) entering into a contract to pay a sum of money for making improvements in the borough, (11) or to borrow money, (12) retaining or appointing an attorney to appear for the corporation, at least, in case of a Municipal Corporation. In India the Statutory Law requires that certain contracts made by a corporation or on behalf of such should be sealed with the common seal of the corporation. (a) It must however be remembered that the theoretical principle has not always been strictly applied specially where practical considerations have necessitated a deviation from the rigid rule. The life of law, as a distinguished jurist once remarked, is not logic but experience. (b) So if the keepers of the seal make it impossible to use it at the moment when it is urgently necessary that an act should be done, the fact

(a) Bengal Municipal Act S. 37; *Chairman South Barrackpore Municipality v. Amulya Nath Chatterjee* I. L. R. 34 Cal 1030.

(b) Holmes—*Lectures on Common Law*. Lec I.

that the majority of the incorporators have consented to its being done will be a sufficient guarantee for the validity of the act (*a*). In America it is now well settled that corporations may contract by resolutions or through agents without seal (*b*)—a clear indication of the victory of practice over theory. In England also when there could be no doubt as to an act being a corporate act *e.g.* when a corporation could be estopped from denying that a particular act was its act, a common seal was dispensed with. Thus acts which were entered of record “as returns to a mandamus, making an attorney in a court of record, certifying a Mayor, or a usage or custom in one of the courts at Westminster” needed no common seal. (*c*) Again the seal is neither a sufficient nor a necessary evidence of incorporation. Thus it is not competent for the number of persons not properly incorporated to assume a common seal and to convert all acts done by the individuals into a

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(*a*) *Exeter and Cretidor Railway Company v. Buller Ltd.*, Chanc. T. T. 1847.

(*b*) *Thomas v. Dakin* 22 Wend (N.Y.) per Nelson C. J.

(*c*) *Grant—On Corporation.* P. 63

corporate act. Lord Eldon remarked in *Lloyd v. Loaring* (d) "It is an absolute duty of Courts of Justice not to permit persons not incorporated to affect to treat themselves as a corporation upon the record."

The common seal is then not an essential incident of a corporation. Here however essentiality must not be confused with technicality. The statement that the seal is not an essential characteristic does not signify that the rule about the manifestation of the corporate will through the instrumentality of the seal may be relaxed on any grounds however flimsy. The seal is the sign manual of the invisible body and it can be dispensed with only when exigencies of practice require. Lord Denman remarked,(2) "We feel ourselves called upon to say that the rule of law requiring contracts entered into by corporations to be generally entered into under seal and not by parol, appears to us to be one by no means of a merely technical nature or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required as authenticating the concurrence of the whole body cor-

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(d) 8 Ves 775.

(1) 8 Ves. 775.

(2) *Church v. Imperial Gas Light Co.* 6 A & E. 846.

porate. If the legislature in creating a body corporate invest any member of it, either expressly or impliedly with authority to bind the whole body by its mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character, by such an act ; and persons dealing with the corporations know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done, or agreed to do. The resolution of a meeting however numerous attended is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else. It is a great mistake therefore to speak of the necessity for a seal as relic of ignorant times. It is no such thing : either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation : and the attempt to get rid of the old doctrine, by treating as valid contracts made with particular members and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.”(1) I have quoted this



long remark in order to dispel any doubts that might have been created in your minds as to the necessity of a corporate seal by the statement regarding the relaxation of the rule in particular cases.

The rule about the common seal may be briefly stated as follows :—The common seal is incident to every corporation although it is not an essential characteristic as already explained. In other words some acts may be legally binding if they fall within the class that legislature thinks might very well be evidenced by any other instrument than a seal, but in general it is the fixing of the seal and that only which unites the several assent of the individuals who compose the groups and makes one joint assent of the whole. (2) The exceptions to this common law rule as regards certain juristic acts performed by a corporation may be put under three heads :—(a) Rules based on custom Where it has been customary for certain classes of acts to be done without seal, law ratifies the custom. When acts done are such as the corporation by its own constitution is appointed to do, no corporate seal is required. (3) (b) Rules based on convenience

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(1) Carr—On corporations. p. 59.

(2) Blackstone—Commentaries Vol. I. p. 476.

(3) Baron Alderson in *Diggle v. London & Blackwall Co.* 5 Exch. p. 450.

and necessity. Where the acts are required for convenience, management and comfort e. g. when the acts are of such a trivial nature as can be more quickly done in an informal way, the formality of a seal is allowed to be dropped. So also when urgency is the prime consideration informality is preferred to a formality causing delay. (c) Rules based on specific character of certain corporations. When corporations have been established by Royal Charters or Parliamentary Acts the Courts have held that some acts, but for which the very existence of these corporations would be impossible, can be done informally e. g. the drawing of a bill in the case of a Chartered Corporation.(1)

(e) To make bye-laws:—According to Blackstone a corporation has the capacity to make bye-laws or private statutes for the better government of the corporation. These bye-laws are binding upon the corporators unless contrary to the laws of the land and then they are void. This incident is also accidental and not essential. For where the objects of incorporation may be carried out without making bye-laws a power to make them is not implied. (2) In Sutton's Hospital case it was expressly mentioned that to make ordinances was not of the essence of a corporation. Where objects of a

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(1) *Mayor of Ludlow v. Charlton* 6 M. W. p. 820

(2) 10 Rep. 31.

corporation require, on the other hand, bye-laws may be made binding on both the members and the strangers as well. Thus the municipal corporations in India may make bye-laws binding on all persons residing within a fixed boundary. The railway companies again under the Railway Companies Act may make bye-laws affecting those who deal with them. The bye-laws, as we shall see later on, must be always reasonable and as the power to make them is derived from the Sovereign, there is a limit which must not be overstepped in framing bye-laws. Many questions regarding *ultra vires* arise in this connection, the details will be referred to in the lecture on that topic. I may mention incidently that the Roman Law gave special powers to *Collegia* to make bye-laws governing the relations of members *inter se* and distribution of corporate property.

The power of making bye-laws, when incident, is to be exercised by the whole body of corporators. Unless the constitution of the corporation vests the power in a select body there is no implication authorizing a majority to act for the whole body. Here again the doctrine of personality explains this rule. The corporators are not the corporation. (1) That is why even in the case of charters granting power

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(1) R. V. Westwood 2 Dow & c 21

to a select group in a corporation to make bye-laws regarding certain specified objects, there is no implication that that select group may make bye-laws for the general purposes of the corporation. Whenever necessary the corporation as a distinct person comes to the fore. (2) The 'Majority Principle' does not apply here.

(4) Incapacities:—Coke mentions certain disabilities peculiar to corporations aggregate. These are in general the consequences of the doctrine of corporate personality. Thus one of the examples of incapacity given by Coke is that a corporation being itself invisible and existing only in the intendment and consideration of law it cannot appear in person in a law suit. The personality is none the less real although it exists juridically alone because this incapacity to appear in person must not be taken as a general rule. For despite Coke's sweeping statement instances are not infrequent where corporations may appear without an attorney; thus a corporation may acknowledge a deed before a judge without an attorney, it may with its head give personal command. (3) When the facts determining a juridical position are such as to be obviously inconsistent with the nature of corporate perso-

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(2) R. V. Phillips cited 3 Burr 1325, *Calder etc., Navigation Co. v. Pilling* 14 M & W 81, 87.

(3) Blackstone—Commentaries Vol. p. 417.

nality it is then only that the legal consequence flowing from those facts cannot be predicated of a corporation. This consideration explains the partial truth of another incapacity mentioned by Coke *viz* : a corporation can neither maintain nor be made defendant to an action for personal injury. This second incapacity has been modified by modern decisions regarding liabilities of a corporation for torts. (4) Again Coke says a corporation cannot be an executor or administrator or perform any personal duties, nor can it be seized of lands to the use of another. These are the classical instances of corporate incapacity, but most of these do not represent the modern view regarding corporate disability as we shall see later on.

(5) *Privileges* :—There are certain privileges granted to a corporation. Some of these are incapacities looked at from a different standpoint just as the incapacity of a sovereign for certain acts gives rise to special privileges which free the sovereign from liability when acts of the specified class are *defacto* done by him.

Coke mentions as a fundamental privilege of a corporation its non-liability for treason, felony, or other crime committed in its corporate capacity. The absence of mentality—an essential factor in criminal liability—being the justificatory ground of this privilege existing

unqualifiedly in Coke's time. But the old rule has been greatly modified by modern decisions. The present rule is that a corporation is liable for all criminal acts where no specific *mens rea* is emphasised. (1). Again in old English law a corporation was not liable to corporate penalties, nor to attainder, forfeiture or corruption of blood, it could not be committed to prison (2) nor could it be outlawed or excommunicated. Much of these is now of antiquarian interest because statutory enactments *e.g.* the Companies Acts English and Indian, the Railway Acts, the Municipal Acts, as well as modern decisions have greatly changed (3) the nature of corporate privileges as enumerated by Coke. The only justification for this bit of antiquarianism is the proof it offers regarding the intermixture of theory and practice in this branch of law.

The discussions regarding the nature of corporations naturally lead to the topic of classification. The subject of classification is however of purely theoretical interest as I have already remarked. But for our purposes the question of classification should once for all be settled at the very start if only for its connec-

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(1) *R. v. G. N. Railway Co.* 9 Q. B. 315.

(2) Pollock and Maitland's *History of English law*, Vol. I.

(3) *Kennedy v. Panama Mail Co.* 2 Q. B. 589. *Whitfield v. South Eastern Ry. Co.* El. Be. & El. 115.

tion with the various conclusions, drawn by the classical writers on the corporation law, regarding the legal nature of corporate personality.

A luminous passage in Pollock's *Contract* states that the well-known classification of corporations under two heads—aggregate and sole—is of Roman invention. The modern law has adopted the Roman invention and largely developed it, whereby the official character of the holders for the time being of the same office or the common interest of the persons who for the time being are adventurers in the same undertaking has been constituted into an artificial person or ideal subject of legal capacities and duties." (1) The idea of Pollock as it can be gathered from his detailed statement is however, not that the Romans definitely divided the corporations into two groups but that they suggested an analogy which is responsible for the English grouping of the corporations in the sixteenth century. Whatever may have been the origin of the classification of the corporations under the heads of corporation aggregate and corporation sole, the fact remains that this classification is of great theoretical importance. Some objections have been raised to the coupling of the epithet sole with the term corporation. The objectors think that the idea of perso-

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(1) Pollock—*Law of Contracts*, p. 107. 6th. Edition.

nality so far as corporations are concerned is closely connected with the presence of a plurality of corporators. A corporation consisting of a single person (*i.e.* a corporation sole) would have appeared a contradiction in terms to the medieval lawyers who were responsible for the development of corporative ideas. But facts must be taken as facts and despite the paradoxical nature of the curious subject of rights who is called a corporation sole, the "subject" must be given a place, in a legal classification, that is his due. A corporation then is either a corporation sole where it consists of a single individual, having an "artificial or legal personality distinguished from his natural character," (1) *e. g.* the King, the Postmaster-general, the manager of a Hindu Endowment; or a corporation aggregate where it consists of more persons than one *e.g.* a joint-stock company. Here it must be remembered that even if by death or transfer of shares in the case of a limited company the corporation of many be reduced to a corporation having one member alone it is still a corporation aggregate because the shares are regarded as remaining distinct.(2) This was the view of the Roman lawyers as well. You remember the famous maxim in connection with

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(1) Blackstone—Commentaries Vol. I, P. 477.

(2) Russell v. Mclellan 14 Pick (Mass).



a collegium—*Tres faciunt collegium*. (1) Even if the three were reduced to one the same collegium existed in name (stet *Nomen collegium*).

The classification of corporations into aggregate and sole is justified more by practical considerations than by theoretical reasons. Let us now advert to certain other schemes that have been proposed for classifying the corporations generally. These may be enumerated as follows :—

- (1) Ecclesiastical and Lay. The principle of division in this case has reference to the object of the corporation and the scheme applies to corporations aggregate as well as to corporations sole. If the aim is the perpetuation of religion, furtherance of religious rights the corporation is termed ecclesiastical e.g. the Dean and Chapter of a cathedral church. If the aim is not religious but secular, the corporation is lay. A lay corporation may in its turn be sub-divided into (a) Commercial e.g. Railway Companies, Banks, (b) Non-commercial e.g. Corporations with powers of local self government.

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(1) Ulpian. Reg. Dig. S. V. Coll.

- (2) Eleemosynary and civil. Eleemosynary corporations, as the name indicates, aim at charity, free alms so to say *e.g.* hospitals, asylums. Endowed charities may be said to be administrated by Eleemosynary corporations. The true test of an institution is its origin and objects. If it is founded on donations and has for its purpose the accomplishment of a charity by the distribution of alms the institution is unquestionably eleemosynary. (1) A civil corporation unlike an eleemosynary one aims at private gains or any other civil purpose not coming within charity. Thus in America it has been held that cemetery corporation (2) is not an eleemosynary corporation, nor is a Youngmen's Christian Association. (3)
- (3) Public and private. The division of corporations into public and private has a practical as well as theoretical importance. The rules of law which apply to public corporations are in many respects fundamentally differ-

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(1) *American Asylum v. Phoenix Bank* 4 Conn. 172, 10 Am. Dec. 112.

(2) *Donnelly v. Boston Catholic Assn.* 146 Mass. 103.

(3) *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280.

ent from those that apply to private corporations. Thus the property of a public corporation is not taxable while that of a private corporation is. A public corporation is created by the state for purposes of government and therefore it can be dissolved or its charter amended as it can be created without the consent of the individuals who compose it. While in the case of a private corporation the consent of the corporators is indispensable for a dissolution or a change. Thus the distinction between public and private is more than of merely passing interest.

A public corporation is a corporation created merely for purposes of government and a private corporation is one that is created for purposes other than those of government (1). "Among the corporations which are clearly public are incorporated cities, villages, and towns, commonly called municipal corporations. A bank is not a public corporation merely because the state uses it as a depository for public funds or because the state owns part of the capital stock." (2) A state board of agricul-

(1) *Dartmouth College v. Woodward* 4 Wheat (U. S.) 518.

(2) Marshall--On Corporations, p. 48.

ture or agricultural society composed of private individuals is not in American law a public corporation although the state has made an appropriation of money for its benefit (2).

Although the distinction between public and private is more frequently drawn in America than in England it may be mentioned that the scheme has a universality that entitles it to a place in an infant system like the Indian Corporation Law which is mainly developing through imitation.

Besides the above methods of classification several others have been proposed which however do not seem strictly logical and some of them are even misleading for example the division of corporations into stock and non-stock takes an accidental circumstance for an essential ground of distinction. Again the distinction between a foreign and a domestic corporation is based not on an essential feature of corporate bodies but only on the accidental fact of the authority or the locality that has to do with the existence, regulation and supervision of the corporations. A foreign corporation may just like a domestic corporation be lay or ecclesiastical, eleemosynary or civil, private or public. Thus the distinction between foreign and domestic has no other utility

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(2) *Downing v. Indiana State Board of Agriculture* 129 Ind. 443  
*Dunn v. Brown County Agricultural Society* 46 Ohio St. 93, 15 Am. St.  
Rep. 536.

than that of serving the purposes of the conflict of laws. Then again the classification of corporations into full-corporations and quasi corporations is not based on a fundamental difference between two bodies agreeing only in the underlined unity of character but is a division separating an entity of one type from another of a totally different type. The quasi-corporation is something similar to a corporation but not an exact one.

It will be necessary in our survey of the law of corporation to deal with quasi-corporations as well because although the bodies called quasi-corporations are not species of the genus corporations yet the expression quasi-corporation has obtained currency as a description of those groups which are minutely regulated by special statutes without being formally erected into corporations *e.g.* Trade Unions, Industrial and Provident Societies, Registered Working-men's Clubs in England. In India the position of the Governor-General in Council renders the notion of quasi-corporation useful in practice.(1)

It rests now to finish this lecture by certain remarks on the nature of corporate personality viewed in the light of observations made regarding the incidents of corporateness. A corporation as I have had repeated occasions to re-

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(1) Ilbert--Government of India.

mark is a person in the juridical signification of the term and it is a real person. The reality however exists in the eye of the law. The consequences that appear at times bizarre on account of attributing to a group some of the characteristics of a human being are nevertheless necessary for the purposes of a developed society. Moreover the so called fictitiousness of a corporate personality is due mainly to a misapprehension of the nature of personality in general. A human being is taken popularly as a type of a person. But on analysis the personality of a human being is found to rest on legal bases that are equally true of groups and associations of a special type as the incidents of corporateness already discussed clearly show. One cannot do better than sketch the observations of Prof. Saleilles on this point—The impression of personality is connected with a purely material and objective reality. It is derived from the fact of an organism being constituted in such a way as a subject of right might develop out of it. So far as the phenomenal world is concerned this 'subject' exercises a faculty which is connected with volition and controlling power. A being who has at his service such a controlling volition manifests a mastery over external objects resulting in divers legal effects. This is a phenomenon that human beings present to an eminent degree.

But if the human beings are taken as types of real persons that does not mean that they naturally by themselves fulfil all the conditions of juridical personality. Because men have a great need of rights they have been clothed with personality. But it is at bottom only relative consequence of our philosophical and social conceptions. Kohler has shown (1) that if the habit of considering certain animals as enjoying some rights relative to their preservation were established, a certain embryonic personality would arise. Such a juridical person is quite conceivable from the standpoint of practical law. Therefore in every juridical personality there is an element of intellectual creation. If by fiction is meant the employment of creative intellect juridical personality is fictitious, the personality of human being is all the more so. Yet despite this element of intellectual creation a human being so far as the legal rights and duties are concerned is regarded as a real person. A "moral person" such as a corporation is in exactly a similar position. It is necessary to recognise the same basis of reality in the case of a group-person as in the case of individuals notwithstanding all the elements of idealisation present in the conception of corporate personality. And it must be observed as the incidents of a corpora-

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(1) Manual of German Civil Law cited by Saleilles.

tion show that there is less idealisation when a corporate group is described as a person than in the case of an infant or an insane individual recognized as a subject of rights. If the one is a fiction the other will be doubly so, but if the personality of the latter is a reality so far as juridical phenomena are concerned, the personality of the former must be regarded all the more real.

One more remark may be made before finishing this discussion. An eminent representative of the school of jurists that has recently appeared in America suggests a modification of the doctrine of corporate personality on which so much stress has been laid hitherto. Prof. Freund thinks that nothing can be gained by a dispute whether the corporate personality is real or fictitious. The practical question "Whether a corporation shall be included under persons depends upon different considerations. When we speak of a corporation, as a rule we do not think primarily of a number of individuals, but rather abstractly of a human agency devoted to distinct purposes under certain definite conditions. The corporation represents to us a social and economic factor which may come in conflict with any other social and economic factor; in other words the element of distinctiveness and consequently of differentiation is present to our



mind. On the other hand, when we speak of a person what we think of is the individual in the totality of his existence. Personality in the common acceptation of the term is equivalent to individuality, and hence excludes the idea of differentiation. We may recognize that some one feels and acts differently in his official and in his private capacity, but without straining language, we do not say that this some one constitutes two different persons. We commonly ascribe to a corporation will, intent, sentiment, and action, but we probably never speak of it as a person" (1).

According to the juridico-psychological view adopted by Freund the conception of corporate unity may be expressed in terms that clearly indicate the practical as well as a philosophical basis of an important legal idea. The legal value of a corporation theory is determined by the explanation it gives of the consequences that follow from acts done in the corporate name. "We distinguish things and persons in Law because each thing may be the subject matter of separate legal disposition, because the act of each person normally entails consequences affecting his person and his rights only. If the connection of persons or of things is so strong that what affects one affects all alike, we designate them by one name

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(1) Freund—The Legal Nature of Corporations p. 81.

expressive of this unity, and the common name indicates in its turn how far the effects of certain acts extend." (1) Thus a certain bond of association may express, through the nexus uniting the individuals, the effects of certain acts better than a group of individuals when the latter are kept distinct from one another. The consequences of an act in such a case may follow the nexus rather than the individuals. Therefore one speaks of identity in a succession of corporators because in law the essential element of identity is the coincidence of act and effect. The corporate name thus expresses this legal unity and reflects clearly the operation of the bond of union. The corporate rights appear then as the rights of an individual and fancied difficulties disappear. To express the reasoning symbolically Freund has adopted the following device—Let  $A, B, C, D, \dots \dots N, P, Q, R$ , be the corporators. Put  $X = A, B, \dots \dots Q, R$ . Now the realists would suppose when the rights of  $A, \dots \dots R$ . are exercised by  $A, \dots \dots N$  in other words when the majority in corporation consent to a certain transaction, it is  $X$  who is not identically equal to the sum of  $A, B, \dots \dots R$  that acts. In other words according to those who believe that all rights must be exercised like individual rights the identity  $X = A + B + C + \dots \dots R$  does not

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(1) Freund—Loc. cit,

hold.  $X$  in this view grows out of the individuals  $A \dots \dots R$  i.e.  $X = f(A, B, \dots \dots R)$ . This functional equation is the symbolical representation of the unity, the identity and the immortality of a corporation. All the legal relations and incidents of a corporation may with the help of such formulae be more or less correctly stated Thus  $X = X$  when  $A \dots \dots R$  is replaced by  $A, \dots \dots R$  respectively. Just as in mathematics when a function remains the same after one set of variables, called arguments, be replaced by another set of arguments, the function is called an invariant so here the invarianative form  $X = X$  means the identity in succession of changing members. Although the incorporators have changed the corporation remains the same. The corporation is a legal person distinct from the individual incorporators.

The follower of the newly started representation theory would call the treatment of a corporation as a distinctive legal person a dialectical device. But even Freund has to admit that the term person in many legal systems includes corporations, and that at what point the distinctiveness of the corporation from its members begins or ceases to be a fiction depends upon the particular circumstances of each case'.(1)

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(1) Reg. v. Arnand 16 L. J. Q. B. p. 50. State v. Standard Oil Co. Ohio St. 137 Freund. loc. cit. p. 7

Such is the nature of corporate personality. The juridical conception refers to the reality in the sense explained. I pass on to discuss the creation, powers and liabilities of a corporation.

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## LECTURE IV.

### Creation Of A Corporation Aggregate.

A corporation may be created either (1) by express authorisation e.g. by charters, Act of Parliament or (2) by constructive authorisation e.g. Common law prescription, custom, implication. In any case the legislative sovereign is a mediate or immediate creator of a corporation. This theory underlying the formation of a corporation in English law and in other legal systems based on English law viz. in American and Indian law has however undergone some modification due to researches in the history of English law. (1) But the fundamental question affecting the origin of group-persons still requires the same answer as of old. In fact wherever legal personality is recognized there is the supposition that the sovereign has consented if not to the creation, at least to the continuation of the legal person. You are well aware, as students of Holland that the personality of a normal human being begins with the birth. But birth alone is not sufficient. State recognition is necessary as well. State recognition coupled with birth turns a natural person into a legal one. In

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(1) Pollock and Maitland—History of English Law, Vol. 1, pp. 486-511. Gierke-Maitland Political Theories in the Middle Ages. Introd.

the case of a corporation the birth however may be contemporaneous with the state recognition, the latter is a *Sine Qua non* in order that a corporation may live move and have its being. The instruments I have just now enumerated are more or less the means of bringing into existence the group persons in almost all civilized countries. Let us take them one by one and examine each with historical reference where necessary.

The charter—In Rome as already noticed at one period of its history the collegia resulted from the voluntary union of individuals for a certain specific purpose. All that is required by the state was that the object of the union should have been lawful. During the imperial regime special authorization by the state was necessary. Sometimes the state granted permission of incorporation by a written document. Some say that no authentic instance of a Roman charter of incorporation has been found. Whatever may have been the case in Roman Law a charter so far as England is concerned was once the only mode of express creation of a corporation. (1) The charter of William the Conqueror to the City of London was sealed with a seal which the charter recites "was bitten with his tooth in token of sooth." (2) The Crown

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(1) Blackstone—Commentaries, Vol. I, p. 473.

(2) Merew & Stephen—History of Boroughs.

sometimes delegated the power of granting charters to private bodies e.g. the chancellor of the University of Oxford has powers of granting charters to certain species of corporations. In the Year Books of 1523 it is mentioned that the privilege of granting charters may in some cases be shared by the King with the Pope. The papal jurisdiction was of course confined to the founding of ecclesiastical corporations. In pre-Reformation England it was however doubtful who might and who might not grant charters of incorporation. After the Reformation it was held that no foreign power could share the royal prerogative of creating corporations by charter.

In England charters might be granted by subjects either because they possessed "royal powers" (*jura regalia*) within certain limits or because they were authorized by the Crown by a special license. Thus within the County Palatine of Durham the Bishops of Durham exercised *jura regalia* so late as 1836 and the city of Durham was incorporated in 1565 by Bishop Pilkington and was governed by a succession of episcopal charter down to the passing of the Municipal Corporations Act. (1) At present *jura regalia* are rarely vested in the subject.

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(1) H. A. Smith—The Law of Associations, p. 13.

Particular corporations have frequently been created by charters issued by private persons under a special license. Thus several Oxford and Cambridge Colleges were incorporated in this way. When an incorporation takes place under a special license, the latter sets out the details of incorporation and the founder has only to repeat the words of license in the charter of incorporation.

Certain points in connection with the charter of incorporation call for special attention. A charter issues from the sovereign at his pleasure. The Crown may grant or withhold a charter just as it likes, but when once granted the charter cannot be revoked without the full "and perhaps the unanimous concurrence of the grantees or their successor". (1) In other words a corporation once brought into being cannot be extinguished unless it has been guilty of an illegal act or consented to die of its own will. One of the essential characteristics viz :—perpetuity, then attaches to it as soon as the charter is granted, even though the Crown limit the existence of a corporation expressly in the incorporating charter. For it has been an accepted doctrine of English law that the Crown, notwithstanding its prerogative of granting a charter incorporating a group, cannot fix the term of

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(1) Grant—On Corporations, p. 10.



existence of a corporation created by itself unless authorized by a parliamentary Act. Grant mentions (1) some instances of corporations created for an ascertained period by a royal charter under an Act of Parliament. (1) Therefore the perpetuity that distinguishes a corporation from a natural legal person, although it is an essential characteristic of a group person in general, may be absent in particular cases where legislative sovereign so demands. This fact however is not a sufficient reason for changing the general theory of Corporations.

Another topic to be noticed in this connection is the delegation of power to charter corporations. When the legislative sovereign is supreme (2), as Dicey would say, this power to delegate its authority to another is a natural consequence of sovereignty. Thus the Crown in Parliament may in England delegate the power to charter a corporation to an individual or to a corporation. Although such delegation may be rare in modern times I have already mentioned some examples which show that in the sixteenth century individuals or corporations very frequently granted charters of incorporation. (3) Such charters were valid because they were issued under delegated authority.

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(1) Grant—On Corporations, p. 11.

(2) Dicey—Lectures on Constitutional Law.

(3) Merew & Stephen—History of Boroughs, p. 1322.

Of course if it is once admitted that a sovereign is supreme it would be illegal to suppose that it could not act as it would. Hence there is nothing extraordinary in the delegations in question. But when the legislative sovereign is not supreme for example in the United States or in India other considerations must prevail. An American writer has remarked "one of this settled maxims of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power has located the authority that it must remain."<sup>(1)</sup> It is evident that in a case like this the delegation of the power to incorporate cannot be allowed. Hence in India there are Municipal Acts and Indian Companies Acts governing public and private corporations respectively but no individual may be authorized by the Governor-General in Council to incorporate a company by a charter.

Here one may remark that the supreme power may limit not only the legislative freedom with regard to corporative and other matters of its subordinate as in India but also of one of its constituent parts. This fact has an important bearing on the grant of charters to certain class of corporations. Thus the

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(1) Cooley—Constitutional Limit, p. 116.

Municipal Corporation Acts in England restricts the power of the Crown to grant charters of Municipal incorporations. The decisions on the construction of the S. 141 of the English Municipal Corporation Act and that of S. 49 of 7 Will. 4 and 1 Vict. c. 78 amending the former section have thus been summarized by Grant:—(a) The grant of a charter of Municipal Corporations is still an exercise of Common Law prerogative of the Crown although such charter invests the corporations with the functions conferred by the acts upon the then existing Municipal Corporations which the Crown has only power to do by virtue of 7 Will. 4 and 1 Vict. C. 78. (b) The Crown may grant the charter to a part only of a town or borough and need not grant it to the whole of the inhabitants of such town or borough although the prayer of the petition is for a grant of a charter of incorporation to the inhabitant householders of the said borough. (c) A petition to be within the meaning of the acts need not proceed from a majority of the inhabitant householders of the place or of the male inhabitant householders of the place. (d) Whether such a petition was under all circumstances the petition of the inhabitant householders within the meaning of the acts, was a question of fact for a jury. (e) Where the whole number of inhabitant householders was 48,000 and a petition was presented to the

Crown signed by 4000 in favour of a grant of a charter of incorporation and another was subsequently presented signed by 6000 against it the jury were quite right in their verdict that the former petition express the wish of the inhabitant householders within the meaning of the acts, the direction of the learned judge at the trial being that notwithstanding such last petition Her Majesty had power, in his opinion, to grant the charter by virtue of the first petition, which direction was also correct. (f) The crown in the charter besides defining the district within which the powers and jurisdiction of the corporation are to be exercised may by its common law prerogative appoint the number and set out the limits of the wards in the new borough. (g) A charter so granted was valid (having been accepted), but that the determination of the Privy Council to advise the Queen to grant the charter is not decisive of the question as to the sufficiency of the petition in favor of the charter. (h) The Crown may in the charter delegate to an individual the power of appointing the first members of the corporate body; or may at all events appoint a person to ascertain who are the individuals possessed of the qualifications which the corporators are to have, in other words who are to be burgesses; and may appoint in the charter another person to revise the list of burgesses and to act as the returning officer at

the first election of officers under the charter. (1)

In the case of the grant of a charter of incorporation the fundamental question is when does the charter become operative? The general character of bilateral acts as understood by jurisprudence furnishes a reply to this question. You know perhaps that a gift becomes operative as a gift when it is accepted. In the case of a corporation the same principle holds. The charter is an instrument that makes a gift of the incidents of a corporation to a body of individuals. It is after the gift has been completed that a group becomes a group-person hence the basic rule that a charter is inoperative until it is accepted. No specific form of acceptance is however necessary.(2) Any unequivocal act shewing a desire and intention to accept a charter is sufficient provided it is done by a majority of the grantees (3) Sometimes an acceptance is implied from corporate acts. The form plays such an insignificant part that it is a settled rule in English Law that the acceptance of a charter need not be under seal.(4)

One cannot but make a passing remark on

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(1) Grant—On Corporations, pp. 16, 17.

(2) *R. v. Hughes*, 7 B. & C. 718, 719

(3) 3 T. R., p. 198.

(4) Year Books, 12 Heny. 7, 25 & 26.

the effect of acceptance of a charter. Though it is optional with the members of a private corporation whether they will take the benefit of their charter, yet once they have accepted it they and their successors are bound for ever. Any obligation contemplated in the charter is an obligation not only for the present corporators but for their successors as well, because they and their successors are one.<sup>(1)</sup> Again a charter cannot be accepted for a time and then repudiated. Once an acceptance always an acceptance unless an existing charter is invalidated by the acceptance of another inconsistent with it.<sup>(2)</sup>

A question of some historical importance is whether a defective charter is rendered binding in all respects merely through acceptance. Now a charter may be defective either because it contains some illegal provisions or because it is issued by the Crown when it has no authority to issue one. Both kinds of defect have given rise to much judicial speculation. Lord Denman said in *Rutter v. Chapman* (3). "It is clear that the acceptance however complete merely concludes the bargain with the Crown, and cannot remove any defects inherent in the charter which render it invalid as a legal instrument." Against this may be set the

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(1) *Brett v. Cumberland Cro. Jac.* 498.

(2) *R. v. Haythorne*, 5 B. & C. *Hayward v. Fulcher*, Palm. 491.

(3) 9 M. & W. 116.

opinion, of Lord Harwicke with regard to the defective charters of Charles II., that an acceptance rendered them valid (1). Two great names in English Law seem to lay down discrepant rules as to the effect of acceptance of illegal charter. But the discrepancy is however only in appearance. The rules may be reconciled if the principles underlying them be taken into consideration. "The charters which had been granted by Charles II. and James II. to various of the then existing Municipal corporations and which all of them more or less interfered with and curtailed the rights, liberties and privileges of those bodies politic, many containing illegal provisions, were after the Revolution divided into two classes by the decisions of the Court ; those which had been granted in consideration of a valid surrender by the corporations of their previous charters and which had been accepted by the corporations, were held to be valid, although containing regulations which but for the acceptance would have been void, as being illegal, and such as the crown had no power to impose ; and secondly those which had been granted in consideration of a surrender never perfected by enrolment, were held to have been void as granted on a misrepresentation of the grantees, which had deceived the Crown ; in other words as having been granted without authority.

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(1) *Rex. v. Johnson*, 2 *Lud. El-Cas.* 173

Several of those charters which were so held to be made good and valid by acceptance contained provisions for the removal of corporators by the crown at discretion, a thing which it is not within the competency of the prerogative to effect, for every corporator has a free hold in his franchise and by Magnacharta Chap. 29 it was amongst other things expressly provided, that no one shall be disseised of his free hold or liberties or franchises and privileges except by judgement of his peers or by the law of the land. It certainly seems in those cases to have been broadly laid down by the courts, that the acceptance of a charter even though the charter might be illegal in itself and therefore void, was sufficient to give it force at least to bind the grantees and their successors. Perhaps therefore the explanation of the apparent discrepancy between the doctrine of Lord Denman and of the Courts in the cases referred to, may be found in the circumstances that the courts in those cases were dealing with questions arising among the grantees or their successors; while in *Rutter v. Chapman* the question was in effect between them and a third party having an interest. For it may be that though acceptance may confer upon the Crown the right of enforcing the provisions of the charter against its grantees and their successors, whatever may be the nature of them, yet it may not



follow that a similar principle holds with respect to claims by third parties, who have relinquished none of their rights by virtue of the acceptance or other acts of theirs and who cannot therefore be affected by any compact between the crown and its grantees." (1)

Act of Parliament—Parliamentary acts form a frequent and a potent means of incorporation. In matters of great movement the Crown would not interfere except in Parliament. As an important statute of incorporation may be mentioned 39 Elizabeth C.5. whereby all hospitals and houses of correction founded by charitable persons were incorporated. (2) A Parliamentary act is generally invoked (3) when two or more corporations are merged into a new corporate body succeeding to the rights and duties of those corporations each of which has lost its individuality in the new combination. Again in the opposite case of making several corporations out of one, an Act of Parliament is frequently resorted to. Thus by a statute of Henry VIII. Surgeon Barber's Company was divided into two companies—a company of Surgeons and a company of Barbers (4). Many important corporations such as East India Company, the Bank of England, the Hudsons Bay Company

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(1) Grant—On Corporations, pp. 20, 21.

(2) Blackstone—Commentaries, Vol. I, p. 473.

(3) Halsbury—The Laws of England, p. 313.

(4) Grant. loc. cit., p. 8.

have been founded by special Acts of parliament. When a corporation is created by Parliament the act of incorporation may be either general or special. In other words a corporation may derive its legal capacity either from a statute that has defined a class of corporation *e.g.* a limited company derives its power from the companies Consolidation Act 1908; or from a statute that has incorporated a corporation in question specifically *e.g.* a County Council created under the Local Government Act.

To perfect creation by the statute it is not necessary to use any special forms of words in the authorizing Act. Intention to create a corporation is sufficient (1). Where a number of persons are so constituted by Act of Parliament that they have perpetual succession, are to continue for all time, may take land, make contracts which shall be binding not upon themselves but upon the persons filling office, and are authorized to sue or be sued in the name of their treasurer, they are in the nature of a corporation aggregate at least for the purposes of the act. (2) Where a statute has allowed a group to deport itself as a group person the personality will be regarded as a gift of the enactment. Consequently not only

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(1) *River Tone, Conservators v. Ash* (1829), 10 B. & C. 349.

(2) *Jefferys v. Gurr* (1831), quoted Halsbury Laws England, p. 320.

the individuals who have applied for incorporation, but all who may subsequently become incorporated or bound by a term of the statute. They are entitled to no rights beyond those mentioned in the statute nor are they bound by the obligations not contemplated by the Act that incorporated them. (1) An important consequence of the creation of a corporation by an Act to be noticed in this connection is that the constitution of a statutory corporation may be changed only by an Act of Parliament (2).

I pass on to the implied modes of creation. The creation of a corporation by the instruments just now enumerated is called creation by expressed methods. The implied modes of creation are those where the legislative sovereign admits without saying in so many words that certain bodies are to be regarded as corporate bodies. The authorization in these cases is therefore constructive. In English Law (and I have to take example from the English law in most cases as originating the fundamental principles that have been later on applied to Indian cases) as already mentioned the implied or constructive modes are (a) creation by common law, (b) Prescription, (c) Implication.

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(1) *Caledonian & Dumbartonshire, Railway Co. v. Helensburgh Magistrate*, 405 H. L. Mann. v. *Edinburgh Northern Tramways Co* (1893), A. C. 69.

(2) *R. v. Miller* (1795), 6 Term. Rep. 268.

(a) Common law. Common law as understood by Blackstone is nothing but a body of customs growing out of a universal agreement of the whole community. When a community has acquired the habit of regarding certain institutions as having certain specific characteristics the sovereign is supposed to have granted his consent impliedly to such conducts of the community. Such instances of juridical fiction, if one may be permitted to use the expression in a sense somewhat different from that in which it has been used by a great English jurist (1), are frequent in English law. As an example may be mentioned the customary right of Turberry in certain parts of England. In the case of a group of men acting so as to manifest the characteristics of a legal person some one sovereign is supposed to have set his imprimature on the conduct of the group, purporting to convert amorphous into a crystallized body. So even in the case of creation by implication it may be said that the express method appears in a veiled form. As students of juridical personality we should not fail to notice the signification of such a tendency of legal thought. The entity that is regarded as real and not a pure fiction derives its reality from the same source that create all juridical beings. Law itself may appear under varied conditions in varied forms but there is an

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(1) Maine-Ancient Law, Chap. II, &c.

underlying unity running through the different manifestations of legal forms. It may be a will of the many or the will of one that gives the law its binding force but none-the-less the intentionality is there as an invariable attribute. The group person consistently with this logic of legal phenomena appears as a group person though the activity of a sovereign intention of one or of many.

The most important examples of corporations created by custom, if Parliament be excepted are however not to be found amongst the corporations aggregate but amongst the corporations sole. The crown itself, the bishops, the persons are common law corporations in England. The Indian law recognises the Hindu idol and the managers of certain religious endowments as corporations sole. The Mretwalis in Mahamedan law occupy approximately the same position. Some of these may be called corporations according to the customs of Hindus or of the Mahamedans as the case may be.

I may take here the case of *Mann v. Edinburgh Northern Tramways Co.* as showing an important point of difference between the statutory authority to create a corporation and the common law power to do the same. When the crown is authorized by a Parliamentary Act to grant charters of incorporation the Crown is bound to observe strictly any conditions which the statute may prescribe and the

corporation so created has very limited powers. While the creation under common law power enables the corporation to do every thing that is not forbidden by its charter of creation. The Edinburgh Northern Tramways Company were incorporated by an act which received the Royal Assent on the 7th of August 1884. G. V. Maun was the solicitor for the bill that passed into the Act authorizing the formation of the company which had the special object of introducing the cable system of tramways on the steep gradient of the North side of Edinburgh. The Act as usual contained the clause that the expenses of obtaining the Act should be paid by the company. The Company through Maun the solicitor entered into an agreement with certain contractors for the execution of the work the company had in view, for £93,000, the contract, providing the expenses of procuring the special act should be paid by the contractors. On the following day another agreement was entered into between the contractors' M, and B an engineer of the company. M & B undertook by this agreement to relieve the contractors of their liability to pay the expenses of obtaining the act in consideration of £17,000 of which £5,000 was paid down. The company brought an action against M & B in the First Division of the Court of Sessions Scotland maintaining that they had no power to retain the balance of £17,000 after defraying

the expenses sanctioned by the Act. The Court directed the defendants to account for the money had and received. An appeal was taken to the House of Lords where the decision of the Lower Court was affirmed. Lord Herschell said "The Lord ordinary has found that the second agreement (that between the contractors M & B) was not communicated at the time when it was made to the directors of the company. But it has been said that there are now no shareholders in the company who have not become aware of this agreement and therefore the Company cannot be in a position to insist that its terms shall not be carried out. My Lords I am not satisfied that that is established. But even if it were it does not seem to be material in this case. I think the fact has been lost sight of, in the appellants arguments, that this is a company created by Act of Parliament, which has no right to spend a penny of its money except in the manner provided by the Act of Parliament. The Act provides (in this case) that the capital is to be raised for the purpose of being expended in making a cable tramway. I am unable to find in the Act any authority, however much the directors may have agreed to and ratified it and approved of it 'which enables this company to spend any of its assets except for those purposes.'" That the rights and duties of a Corporation created by a special Act of Parliament

are limited by the terms of the Act is a doctrine well established at present. Therefore the promoters, the directors or shareholders of a statutory company cannot vary the powers conferred by the statute by any agreement among themselves. Thus in the case of a Parliamentary Corporation the legal capacity of the corporate body is limited by a special boundary fixed by the incorporating statute while in the case of common law corporation there is no other limit fixed except the one defined by the Maxim *sicutere tuo ut alienum non laedas*. The reason for this difference is that utilitarian considerations require the legislature to be chary of granting unlimited freedom to its own creatures, *e.g.* In the case of a company created by a Special Act of Parliament no contracts behind the banks of company and of those who represent it are allowed so as to vary the terms of the statute of incorporation, because when a body apply for an Act of incorporation what they ask for of the legislature is not an Act incorporating and giving powers to those only who are applying, not necessarily even incorporating and giving powers to any of them, but an Act incorporating all persons who may be willing to subscribe the specified sums and so to become shareholders in the company. "If the Legislature accedes to such an application, the act when passed becomes the charter of the company,



prescribing its duties and declaring its rights and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act and liable to no obligations beyond those which are indicated. If this not be true principle the Legislature must be making it auxiliary to serious injury. When a capitalist, believing in the probable success of a particular project sanctioned by the Legislature is satisfied with the terms of incorporation embodied in the Act, he reasonably advances his money on the faith of those terms and if the project turns out a failure he has no right to complain. The speculation was one as to the prudence of which he had the means of judging, and no injustice is done to him if in the result he sustains a loss. But surely the case is very different if, behind the terms of incorporation expressed in the Act, there are others of which the public have no notice, but which are to be held equally binding on the shareholders as if they have formed part of the charters of incorporation." (1)

(b) *Prescription*—When a body of men have exercised corporate powers for a time whereof the memory of man runeth not to the contrary, the law has looked upon the body as well created corporation. One may be reminded

(1) *Caledonian & Dumbartonshire Ry. Co v. Magistrate of Halensburgh* (2 Macq. 391).

that the theory of prescription rests on a fiction of a lost grant. "Some usage which might or might not have had a lawful origin is proved to have existed from time immemorial *nec vi nec clam nec precaria*. Now in the eye of the law this could have had no lawful origin excepting a grant; therefore in order to avoid pronouncing the user in question to be unlawful the court presumes unless the contrary is proved that there was once a grant and that it has, in the course of time been lost or destroyed." (1) This fiction of lost grant as Kyd supposes is the basis of creation by prescription. The corporation is bound to prove that it has acted as a corporation time out of mind. On proof of that fact which is supposed that a charter of incorporation was granted but it has been lost through some accident. One peculiarity of creation by prescription is that a subsequent grant of charter does not alter the prescriptive nature of the corporation, because prescription implies a royal grant and the crown cannot by its second grant take away the efficacy (2) of the first. But if the corporation is reconstituted by a Parliamentary Act it would depend on the construction of the incorporating act whether there has been a transformation of the origin of the corporation in question, for a Parliamentary Act can if it likes change the

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(1) Smith—Law of Association, p. 11.

(2) *R. v. Mayor, &c., of Stratford-on Avon* (1811), 14 East, 348.

effect of a former Parliamentary Act or any other act.

In England the city of London is regarded as corporation created by prescription. In America the doctrine of a corporation by prescription has been recognised with reference to public as well as private corporation (1). In modern times it is seldom necessary to prove incorporation by prescription because most of the prescriptive corporations are the Municipal boroughs which have been reconstituted on a common basis by the Municipal Corporations Act of 1835 supplemented by subsequent legislation. Although these acts have not turned the old Municipal boroughs into statutory corporations yet, the admission in the statutes that they are corporations renders any further proof of their corporate character unnecessary (2). In India the modern Municipal Acts and Companies Acts have left no room for the application of the doctrine of prescription to corporations.

(c) Implication. Sometimes a group assumes a corporate franchise and although unwarranted by a charter or an act exercises the rights attributable to a corporate body. It usurps the rights and franchises of a sovereign. In such a case if the sovereign permits it to exist in a *de facto*

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(1) *Greene v. Dennis*, 6 Conn. 293. *Bow. v. Allenstown*, 34 N. H. 351.

(2) *A. G. v. Simon*, (1837), 9 Sim., 30.

corporate form, a corporation is created by implication. In America such corporations are frequent. (1) A corporation *de facto*, it was remarked in *People v. LaRue*, may legally do and perform "every act and thing which in the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid and even as against the state, except in direct proceedings to arrest its usurpation of power, its acts are to be treated as efficacious."

The creation of corporations by constructive authorization is admitted in English law on account of the assumption that every corporation owes its being to the will of the sovereign. This doctrine as led to some doubt in cases where partial corporateness has been granted by the King Rolle observes in its abridgments "if the King grants land to the Men of Dale, their heirs and successors, rendering a rent, for anything touching that land this is a corporation but not to other purposes." (2) This remark makes it clear that in a like case corporateness is partial. Again the leading case of *R. v. Conservators of Tone* establishes the rule that in case of implied

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(1) 67 Cal. 526.

(2) Rolle—Abridgements, Title Corporation.

creation a corporation is competent to do certain acts as a corporation while it is a mere Association for the purposes of other acts. The conservators of the river Tone and their successors were authorized by an Act of Parliament to hold an estate in fee simple. The act ordained that there should always be "Conservators of the said river Tone in the County of Somerset, take and receive chattels, money, land in fee, &c., and might sue and be sued on certain contracts in that name." Littledale J. observed "the first question is whether the conservators of the river Tone are a corporation? In the case of the Sutton Hospital, it is laid down that the words *incorporo fundo, erigs* are not in law requisite to create a corporation, but that other equivalent words are sufficient. The Act of Parliament contains provisions which show a manifest intent in the legislature to make the conservators of the river Tone a corporation for all the purposes of keeping the river Tone navigable and all the incidents of a corporation will attach to them". Thus here as Rolle suggested there was a partial incorporation for a limited purpose viz. to keep the river Tone navigable and to sue for an injury to real property as a corporation.

Here I may be permitted to draw your attention to the close connection between law and common sense. To require that all bodies which claimed to be corporate should trace

their corporateness to a direct warrant from the King would have been to commit a serious injustice. A hide-bound theory of law cannot but die of their sheer inanition. There are occasions and those quite frequent from legal facts necessitate at least a partial remodelling of legal theory. The doctrine of implied creation of a corporation is an example in point. The lawyers of onetime laid it down as an inviolate maxim that all corporations derive their being from the direct grant from a sovereign. They had before their mind the common examples of corporations created by royal charters coupled with the matters of facts was the fundamental doctrine of intentionality illegal creations. All legal entities must derive their legal existence from the intention of the sovereign. This almost universal doctrine had to be modified by introducing certain qualifications when the state of facts called for such changes in the theory certain associations, guilds, and boroughs possessed, what has been called, natural corporateness. These associations and guilds demanded in England like their forbears in Rome that they should be given a legitimate place in the legal hierarchy. One would be drawn further away from the direct route if any attempt was made to follow the history of the struggle between the amorphous groups of English law and the crown lawyers till the latter were constrained to recognize the cor-

porate character of those groups. In the reign of Elizabeth the boroughs were fighting hard for their corporateness but the lawyers are not yet trained to admit group personality when the royal intervention has been absent. The fiat must come from the Crown, the Kingly prerogative is alone competent to grant the corporate franchise. A *de facto* corporation without a *de jure* grant of corporateness is to the Elizabethan lawyers an absurdity. "The more the boroughs believed themselves to be corporate the more were they brought under the power of the King." No charter no corporation. In fact a statute of the time of the Restoration gave the sovereign the power to pulverize a group into group units whenever a tendency was manifested by an association to act as a group body.

The activity of the Crown when it moved against towns and boroughs has been well summarized by a recent writer on the corporation law. (1) London was the first to be engaged in fight. As a borough it had an almost immemorial antiquity, it possessed many charters dating from William the Conqueror downwards. But it was successfully urged against the citizens that they were acting in many respects transgressing the powers given by the charters. They were

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(1) Carr.—Law of Corporations.

assuming certain corporate capacities not deducible from the grant. They moreover scandalized the King's Government, oppressed their fellow subjects and thereupon they had forfeited their liberties. This signal victory for the forces of the crown was well followed up. Royal officers were despatched far and wide to terrorize corporate bodies by threats of similar actions. Some surrendered on the terms that they should receive new and valid grants of incorporation from the King, others held out and were attacked. The struggle went on till the time of William III who legitimatised retrospectively the assumption of corporate powers by certain bodies. This change in the policy was a concession to the needs of the times. It is a proof of the existence of corporations unincorporated by the crown. The semblance of corporateness grew by degrees into the reality of corporate-ness, and the lawyers had perforce to modify the theory of creation of corporate bodies. They had to admit that there might be by the side of express grant an implied grant although in the latter case no proof of a gift was forthcoming. The legal fiction of lost grant was but a tribute paid to the legal necessity of the changing times. Here as in every other branch of law common sense has prevailed over dialectical device. "The life of law I may repeat again is not logic but experience."



One word more with regard to birth of corporations and I shall have done with this topic. In modern times Registration has been noticed as one of the modes of creation of a corporation aggregate. Since the passing of the Companies Acts English and Indian this method of incorporation has been quite frequent in England as well as in India. Registration, if considered as an independent mode of creation, must be classed along with other express modes but it is quite conceivable that objections may be raised against considering it as a coordinate rather than a subordinate statutory mode. In fact it has been pressed forward with some justice that incorporation by registration is but an indirect statutory mode of creation. The economic conditions of the present day have made it necessary that in certain circumstances there should be a simpler mode of creation than any of the others already noted. The direct method is now only used in the case of bodies which are intended to have exceptional privileges or which occupy an important public position. So the railway companies are directly incorporated since they require large powers of purchasing lands and the creation of a new Railway may considerably disturb the economic balance in a particular area. The promoters of a new railway company are consequently, called upon to justify their project before a parliamentary committee that goes

into questions affecting all parties concerned. But the majority of modern corporations do not exercise any important public function. They are mostly bodies grouped together for the purpose of ordinary trade. In such a case it would be obviously absurd if parliament were called upon to go into the expediency or otherwise of a minor project. Thus the Companies Consolidation Act of 1908 grants a privilege of incorporation to any seven persons who comply with certain specified formalities—registration being one of the latter. The Indian Companies Act has laid down similar rules in regard to similar circumstances. Registration therefore is only a subordinate mode of origin of a corporation.

Whatever may be the merits or demerits of awarding registration an independent position in the scheme classifying the modes of origin of a corporation it must be observed that the concessionists have made capital out of this latest method which, as I have already remarked, is however due to the modern economic necessity. The concessionists declare that corporateness is a special privilege which is the gift of the state. "There must initially be some formal acts indicating that permission has been given by the sovereign power." (1) In other words they say that the corporation is

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(1) Carr.—On Corporations, p. 174.

and must be the creature of the state. "Into its nostrils the state must breathe the breath of a fictitious life otherwise it would be no animated body but individual dust" (1).

I have no intention of entering into the history of metaphysical discussions regarding the nature of corporate personality. You have already observed that it is impossible to formulate a general theory of group-personality that shall apply to all systems of law. Even if it were possible to attain theoretical perfection in this direction it is extremely doubtful whether such a general result would be of any practical value. It has been well suggested that whether any particular bodies shall or shall not be regarded as juristic persons is a matter upon which every system of law is at perfect liberty to make its arbitrary choice. The idols of Hindu Law afford pertinent examples of this statement (2). In view of the arbitrariness which is an essential factor in legal development it is idle to formulate a theory free from the fundamental defect in the phenomenon that it attempts to explain.

Without waiting to repeat what has been fully stated in lecture II I pass on to consider the powers and liabilities of a corporation aggregate.

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(1) Gierke—Matland - Political Theories of Middle Ages Intro., p. XXX.

(2) Maharaja Jagadindra v. Rani Hemanta Kumari, (1898) L. R. 31 Ind. App. 203.

## LECTURE V.

### Powers and Liabilities.

THE general powers and liabilities of a corporation are nearly the same as those of an individual legal person. Of course *all* that is included within the legal capacity of an individual does not fall equally within the province of corporate capacity. The legal rights and duties denote certain facts and connote certain consequences. The capacity of a corporation is determined by the condition of facts that are true of it. That is why all the powers of an individual as you have already noticed cannot be asserted to exist in the case of a corporation. Marry it cannot nor can it have an heir of its body. Within the limitations prescribed by the nature of the entity it can have, however, as extensive powers as possible for its existence. Correlative to the rights it has certain liabilities. These rights and liabilities may be varied by special statutes just as in the case of an individual certain privileges and powers might flow from special enactments. I have remarked for example in connection with statutory corporations how their legal capacity is delimited by the incorporating act. The same instrument that restricts the liberty of action in the case of a

specified corporation may invest it with additional powers that are not necessarily enjoyed by all statutory corporations. Thus the power of compulsory acquisition of land is incident to certain statutory corporations, but not to all *e.g.* The Municipal Corporations in England and India are given by the Municipal Corporations Act the power of compulsory purchase.

The restriction on corporate capacity has led some writers to remark that a corporation has no natural powers. Such an extreme statement only means that a distinction is to be drawn between natural legal persons and juristic persons. To use a German expression, made familiar by Neubecker, (1) *the rechtsfähigkeit* that invests a group person with powers to act as a person is not of exactly similar type as the one in connection with a natural person. The limit that is set to the corporate activity is prescribed by the nature of its birth. It is a creature of the law and can consequently exercise no other powers than those expressly or impliedly conferred upon it by its charter of creation. (2) In *South Yorkshire Railway v. Great Northern Railway Co.*, it was said that a corporation might do any act that was not expressly

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(1) Neubecker—Jurist Personlich.

(2) *Ashbury Railway carriage v. Riche*, L. R. & H. L. 653; *Wenlock v. River Dee Company* 19 Q.B. D. 155.

prohibited by its charter of incorporation. (1) This dictum if true would set a wider limit to corporate activity. But it has been doubted in American as well as in later English cases. Thus in a leading case in the Supreme Court of the United States where the validity of a lease granted by a railway company was questioned the lessees contended that a corporation might do any act not prohibited by its charter, but the Court said "we take the general doctrine to be in this country that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a Corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all other. (2) One may say that it is well settled now that the powers not expressly or impliedly granted to a Corporation are impliedly prohibited, as Lord Cranworth remarked in *Shrewsbury and Birmingham Ry. Co., v. North West Railway Company* (3) "practically it makes very little difference whether we say that the Railway Company has no authority given to it by its incorpora-

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(1) 9 Exch. P. 84.

(2) *Thomas v. West Jersey Ry. Co.*, 111, U.S. 71; *Mallory v. Hanaur Oil Works* 86 Tems. 598.

(3) 6 H. L. Cases, 113.

tion to enter into contracts as to matters not connected with its corporate duties or that it is impliedly prohibited from so doing, because by necessary inference the legislature must be considered to have intended that no such contracts should be entered into."

The foregoing observations make it clear that it is safer to say that a corporation has no power except what is given by its incorporating act either expressly or as incidental to its existence and to its express powers. In *Salem Mill Dam Corporation v. Ropes* it was laid down that no vote or act of a corporation can enlarge its chartered authority either as to the subjects on which it is intended to operate or the persons or the property of the corporators. If created with a fund limited by the Act it cannot enlarge or diminish that fund but by license from the legislature and if the number of shares is fixed by the Act it cannot be changed by the corporation.

Now a question may be asked with regard to certain powers conferred by a general act on the citizens of a place. If a corporation is a person as understood by the legislature when it says that the word person includes the bodies corporate, *e.g.*, the Interpretation Act, 1889 (52 and 53 Vict.), would the rights conferred on citizens as persons be available to the corporations as well? No English or Indian decision seems to have settled the question. One may

say, however, that before answering the question in the affirmative it is necessary to distinguish between a person and a citizen. It is true that all citizens in general are persons but all persons are not necessarily citizens. Consequently the rights available to a citizen are available to a corporation if it be called a citizen. In the United States it is well settled that a corporation is not a citizen within the meaning of the United States Constitution which declares that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several State. In *Tatem v. Wright* (1) it was observed that the privileges and immunities secured by the constitution to a citizen belong to him as a natural person and cannot belong to an artificial being like a corporation. But one might suggest that the ratio decidendi could have been the distinction between a citizen and a person and not that between an artificial and a natural person. Because if the legislature chose it might have converted the so called artificial being into to a citizen, just as it has included the corporations within the class designated as persons in law. Of course when it appears from the nature of the case that certain powers presuppose conditions that cannot apply to a Corporation, such powers even though conferred on persons generally cannot be exercised by a

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(1) 3 Zamb 429, N.Y. Supreme Court, 1855





Corporation. Thus in *St. Leonard's Shoreditch Guardians v. Franklin* (1) it was held that a Corporation aggregate could not be a common informer and therefore could not sue for or recover penalties declared by a statute to be recoverable by the person or persons who shall inform and sue for the same. Again in *Wills v. Tozer* (2) the same doctrine regarding the exclusion of Corporations from the class of legal persons, when these are generically named, was laid down. An Act of Parliament incorporating the commissioners, *Clauses Act 1847*, contained a provision that certain commissioners should be elected by a majority of the votes of the persons present and entitled to vote at the respective meeting for the election, such votes to be given in writing under the hands of the respective voters, but a proxy is not to be admitted in any case. It was decided that 'persons' did not include Corporations and these could not vote. Thus it may be said that the powers and liabilities of a Corporation, unless restricted by a special statute, are the same as those of an individual person so far as the conditions of facts allow. The specific examples of powers and liabilities that I shall mention presently will make this statement clear:—

*Bye-Laws.*—While discussing the incidents of a Corporation aggregate, I had occasion to

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(1) (1878) 3 C. P. D.

(2) (1904) 20 T. L. R., 700.

notice Blackstone's remarks on the capacity of a Corporation to frame special laws affecting the corporators and sometimes even *out-siders*. This power, however, is not an essential characteristic of a Corporation, because innumerable group bodies, although Corporations in the strictest sense of the term, have no power to make bye-laws, *e.g.* an ordinary Joint-Stock Company is bound by the Memorandum of Association, but cannot give laws to those dealing with it and has no power of making bye-laws. But when the purposes of a Corporation require it the sovereign delegates to it law making powers. The laws framed in exercise of such delegated powers are called by Austinians "bye-laws" implying thereby that a non-sovereign body is the author of them. Nonetheless they are effective laws, only there are certain limitations with regard to their province while no such boundary exists in the case of laws passed by the supreme legal sovereign. On account of the limited power of a corporation to make laws, a question, regarding the bindingness of rules made in excess of power, arises. The doctrine of *ultra vires* will make us familiar as to what is meant by a corporation acting beyond its powers in certain cases. At present we are concerned with the fundamental rules regarding bye-laws of a corporation.

A bye-law, according to Grant, is a rule obligatory on a body of persons or over a

particular district not being at variance with the general laws of the realm, and being reasonable and adopted to the purposes of the corporation ; and any rule or ordinance of a permanent character which a corporation is empowered to make either by the common or statute law is a bye-law. (1)

The topics relating to bye-laws are so important in corporation law that certain details with regard to the power to make them, their validity and effect and the power of enforcement must be mentioned.

I have already drawn your attention to a fundamental question with regard to the power to make bye-laws—vis., is this power always implied? Although there was a difference of opinion at one time on this point, later decisions have thoroughly resolved any doubt that might have existed. Grant observes “the principle has sometimes been laid down in more general terms, asserting the power to make bye-laws to be incident to every corporation aggregate ; but there does not appear to be good authority for such an extensive rule ; nor indeed is the question likely to arise except in cases where some powers of Government either over localities or bodies of persons are lodged in the corporation.” Thus the eleemosynary corporations have no incidental legislative powers. They are

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(1) Grant loc. cit , p. 76.

the creatures of their founder and he alone has a right to prescribe the regulations according to which the charity is to be applied (1). But in certain classes of corporations, e.g., Municipalities, Railway Companies, that are entrusted either with local Government or with carrying out some specialized trade or business the power to make bye-laws is implied even without express statutory grant (2). In such a case the bye-laws are obligatory on all the corporators and each one is bound to take notice of them (3). And besides the corporators all the inhabitants of a district over which a corporation is authorized to exercise territorial jurisdiction are bound by the bye-laws (4).

The next question is in whom is the power to make bye-laws vested? The power of making bye-laws in all corporations to which it is incident by the common law is to be exercised by the entire body of corporators, as distinguished from select bodies unless the constitution of the corporation has vested the whole power of making bye-laws in some particular parts or body of the corporation; but in such a case a special power given by the charter to a select body to make bye-laws touching

(1) *Bentley v. Bishop of Ely* Fitz. 6. 305, *Reg. v. Dulwich College* 21 L. J. N. S. 36.

(2) *City of London v. Vanacker* 1 Ld. Raym. 496, *City of London v. Wood* 12 Mod. 669.

(3) *Vantries Co. v. Passey* 1 Burr. 250.

(4) *R. V. Trevethan* 2 B. & A. 339.

certain objects therein specified does not by implication deprive the body at large of the power to make bye-laws which previously existed in them (1).

Here I must notice certain points concerning the majority principle as it obtains in the rule for making bye-laws when a corporation is empowered to make them. This principle, moreover, is connected not only with the exercise of one of the important powers of a corporation, *viz.*—to make bye-laws, but with the general administration of corporate business. You will find in any practical treatise on corporation law rules regarding the Government of a corporation. Many of these have reference to acts done by majority. In fact where it does not appear in a charter creating a corporation that all acts are to be done by the whole body, the act of the majority may be taken as the act of the whole. (2) What is the underlying idea? An obvious answer is that the practical necessity of some such measure is the foundation of the recognized rule. Whenever an act is to be performed by many, if all cannot concur, voice of the greater part will be the voice of all, else business cannot go on. Such a solution has the merit of simplicity, but there is deeper meaning hidden under this

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(1) H. L. 1830, *R. v. Westwood* 2 D. & C. 21.

(2) *Felt Makers Co. v. Dairs* 1 Bos. & P. 98, *Hills v. Hunt* (1854) 15 C. B. 1.

apparent triviality a meaning recently unfolded by Saleilles (1) and Gierke. (2)

The history of the majority principle is bound up with the development of the theory of corporate personality. When Ulpian said (3) "whatever is done by a majority is referred to the *Universum*," he was, without knowing it foreshadowing the rule of debates in any meeting of the Municipal Commissioners in Calcutta. The majority principle throws into strong light the reality of corporate powers in the legal domain. It implies an administrative mechanism which is revealed to the exterior as an organized institution and it appears at the same time as the most practical instrument for expressing collective will. Its only justification, however, is that it raises a strong presumption that the preponderating will is the supposed will of a collectivity. This group will is the ideal will which a collectivity would have had if it had possessed an organ sufficiently adequate for expressing its will. The collective will corresponds best with the aims of the group. The majority principle supplies the group with an organ which it would otherwise lack (4). Connected with this practical aspect of the majority principle

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(1) De La Pers. Jurid., p. 98.

(2) Majoritätsprinzip-Oxford Essays in Legal History, p. 312.

(3) Gierke, loc. cit., p. 313.

(4) Saleilles loc. cit., p. 99.

is the other explanation based on the normative force of a habit that has established itself. What has been repeated many a time is normal and what is normal is withal constraining. Gierke has summarized this habit of "majority action" that has prevailed in diverse countries and in diverse times. It may be instructive to note the main steps in the growth of the majority principle:—

*First stage*—Even when majority doctrine was in its infancy it was playing a considerable part in political life. The primitive groups knew how to weigh the individual votes. The vote of a lord outweighed that of his vassal. The landgemeindes of the 10th. century would present a general parallel to the Commissioners' meeting, but a distinction would lie between a rich commissioner and a poor commissioner. When the electoral colleges were established the individual votes became merged into the group-votes. The value of concrete distinction was lessened with the rise of the abstract entities. The individual person was making way for the group.

*Second stage*—The consequence of the establishment of electoral colleges was the levelling of all the individuals to the same plane. No distinction between the value of a vote of a rich college and that of a poor college was allowed. But when business had to be transacted a certain order, procedure

became necessary. The greater colleges were given precedence over the lesser ones. The greatness of a college depended on its size, its numerical strength. The idea of a greater number prevailing over the smaller was thus coming to the fore.

*Third stage*—When group-bodies were quite common the idea of a majority prevailing over a minority had already taken root. So in matters requiring corporate consent the voice of the greater number came to be regarded as the voice of the group entity working by means of its representatives. It is the custom of looking at a phenomenon as necessary that has given rise to the rule of majority action. But an opposite tendency is already manifesting itself in some quarters. The *liberum veto* of polish law (1) will perhaps, some say, one day assert itself in diverse legal systems. Till then, however, one must remain content with the old principle.

The next topic of importance is the restriction to which the power of making bye-laws is subject even when such a power is incident to a corporation. The bye-laws as has already been remarked being laws passed by nonsovereign bodies are subject to certain general conditions laid down by the sovereign. The following limitations apply to bye-laws in general :—

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(1) W. Konopezyuski-Principle Majoritaire. Oxford Legal History Essays



(1) They must be reasonable and not contrary to law. A bye-law that is unreasonable or illegal is void. Thus it has been held that a corporation cannot make a valid bye-law impairing the right of a person to sue in the courts or changing the jurisdiction of the court as established by law (1). Again a bye-law conferring on stock-holders the right to return their shares to the corporation at a fixed value and limiting their liability to creditors as fixed by law is invalid in America (2). In Indian and English Law in order that a bye-law affecting stockholders or members of a limited liability company may be reasonable, it is necessary that the bye-law in question should affect all stockholders or members alike. Thus a statute authorizing a corporation to pass bye-laws for sale of delinquent stock or unpaid assessments does not authorize a bye-law or resolution declaring a forfeiture of the stock of a particular stockholder only. The remarks of Campbell, C. J., may be quoted as applicable to Indian cases although they were made in a Michigan case:—"It is plain that all corporation bye-laws must stand on their own validity and not on any dispensation granted to members. They cannot be subjected to any conditions which do not apply to all alike, and cannot be compelled to receive, as

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(1) *Nute v. Hamilton Mutual Ins. Co.* 6 Gray (Mass) 174.

(2) Marshall—On Corporations, p. 878.

matter of grace, any thing which is matter of right ; neither on the other hand should there be personal exemptions of a general nature from any valid regulations that bind the mass of corporators" (1). In some cases a bye-law has been held void because it tended to establish a rule different from that of the common law although it was otherwise unobjectionable. Such a view has, however, been doubted by some jurists. The general opinion seems to be that a bye-law intended for the government of a corporation is valid if it is reasonable and consistent with the charter of incorporation or with the Act creating the corporation (2). In *Tribhovan v. Ahmedabad Municipality* it was decided among other things that in virtue of the power to make bye-laws the municipality makes certain rules not specified in the act creating the municipality. But the power should be so exercised as not to create bye-laws inconsistent with the act relating to municipal administration (3).

(2) They must not be inconsistent with the charter, enabling Act or articles of association. A bye-law in order to be valid must be not only reasonable, but also it must be consistent with the charter of corporation or

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(1) *Campbell in People v. Youngmans Father Matthew, Total Abstinence Benevolent Society*, 41 Mich. 67.

(2) *Bengal Municipal Act*, S. 350

(3) *I. L. R.* 27 Bombay 221.

the enabling statute or the article of association as the case may be. This rule is a consequence of the fact that a corporation has such powers only as are conferred on it by a charter or any other instrument of incorporation. A bye-law that outsteps the limits laid by such an instrument is clearly void.

(3) They must not deprive a member of his vested rights or impair the obligations of his contract of membership. In other words although the bye-laws are intended to regulate the conduct and define the duties of the members of the corporation to the corporation and between themselves, the power to make bye-laws does not authorize a corporation to infringe the existing rights and obligations of the members or stockholders. Thus where a corporation makes a bye-law authorizing the issue of preferred stock when the corporation that has passed this bye-law is not expressly authorized to issue preferred stock and when a holder of common stock objects, such a bye-law is clearly void (1).

(4) The power to issue bye-laws must be exercised by the authority and in the mode prescribed by the act of incorporation or the general law. So the Indian Municipal Acts lay down the steps that must be taken in order that a bye-law may be effective. If the procedure to be followed in making bye-laws be

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(1) Kent v. Quick-silver Mining Co. 78 N. Y. 159.

not adopted the bye-laws will cease to have any effect.

The next important instance of corporate power is the capacity to own property. It is a generally settled doctrine that a corporation in modern times can hold property real and personal even in an unendowed form. Nothing can be more reasonable than the modern law as to corporate property if the theory of corporate personality is kept in view. But one must be on one's guard against supposing that an apparently obvious conclusion easily deducible from theoretical considerations has appeared as such in all times. Legal rules, more often than not, have to pass through diverse modifications demanded by practice before they appear in a simple, symmetrical form proper to supply a basis for abstract generalization. The rule regarding the ownership of property by a corporation has been no exception. Throughout its career it has had to adjust itself to the demands of mortmain and perpetuity. The historian of English law will tell you a long story about the influence of the doctrine of Mortmain on corporation law. The law of perpetuities again has had many exponents in England and America who have traced the connection between charities and corporations through the principle of perpetuity. Here in our own country a distinguished jurist has dealt with the law of

perpetuities as applicable to British India. One can do no better than consult the Tagore Law Lectures for 1898 in order to learn the fundamental principles of that important branch of law so narrowly connected with our present topic. Allow me one or two brief remarks in connection with Mortmain and perpetuity just to show the barring of each of these on corporation law.

First as to perpetuity. The rule against perpetuities is to be borne in mind while conveying property to a corporation. The rule shortly stated is that no bequest is valid whereby the vesting of the thing bequeathed is delayed beyond the life time of one or more persons living at the testator's decease and the minority of some person who comes into existence at the expiration of that period and to whom the thing bequeathed is to belong if he attains full age. Thus the word perpetuity as used in this context has a technical meaning (1). The fact that a corporate body may hold property for ever is no infringement of the rule. The only condition to be observed in the case of bequests of realty to corporations is that the vesting of the property should meet the demands of the rule against perpetuity. Moreover in the case of personalty a corporation can hold it to any extent and subject to no special condition. In other words the

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(1) The Indian Succession Act, S. 101,

static aspect of property presents no difficulties whether the subject of rights be an individual person or a group person, but as soon as the right is set in motion, the dynamic condition requires certain other limitations to be observed. Of these limitations the first is supplied by the doctrine of *ultra vires* and the second by the doctrine of perpetuities. In conveying real property to a corporation care should be taken as I have just mentioned that the property shall necessarily vest within the limits allowed by the rule against perpetuities. Again if any attempt is made to bind the corpus of the property by any permanent trust, it will be necessary to consider whether the purpose of the trust is or is not charitable. In the former case the direction will be held as binding, in the latter case it will be bad as a perpetuity. If money is bequeathed to a charity with a direction that it be converted into land the direction must be disregarded and the money goes to the charity unconditionally. The term charity is like the term perpetuity used in a technical sense. It has not *necessarily* a reference to the idea of poverty as perpetuity has no reference to the idea of infinite time. Lord Macnaughten said in the *Commissioner of Income Tax v. Penesel* (1). "Charity in its legal sense comprises four principal divisions (a) trusts for the

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(1) (1891) A. C. 531.

relief of poverty (b) trusts for the advancement of Education (c) Trusts for the advancement of religion and (d) trusts for the other purposes beneficial to the community not falling under any of the preceeding heads. So when a corporation is concerned with the taking of property no very complicated questions arise, the only difficulty being with regard to perpetuity and then the subsidiary consideration is whether in a given case a corporation may be treated as a charity. Fortunately one is not troubled with finding out any historical justification for regarding a corporation as an endowment *piae causae*. The matter is severely practical and different legal systems are of different opinions as to the nature of charitable corporations, the ration decidendi presumably being public policy. Thus an Oxford College (1) is a charitable corporation so also is an Indian University under the Indian Universities Acts. One may mention in passing that doubt was raised by the Municipal Commissioners of Bombay as to the position of Bombay University when the latter claimed exemption from the payment of Municipal Taxes on the ground that the university was a charitable institution. It was alleged on behalf of the Bombay Municipality that the Bombay University was not a charitable corporation because it was not a teaching but a merely examining body.

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(1) A. G. v. Green, (1789) 2 Bocer.

But Sergeant, C.J., held "that although the University might not be actually engaged in education, the special object for which it grants degrees is the advancement of education, and the mere circumstance that small fees are required from the students before examining them, which produce a revenue insufficient to defray the expenses of the University in conducting those examinations and keeping up the necessary establishment and which require to be considerably supplemented by Government, cannot alter the essential character of the purpose for which the University Buildings are occupied" (1). This was decided even before the Indian Universities assumed, more or less, the teaching functions contemplated by the Universities Acts of 1904. The modified Indian Universities may with still more justice be included in the category of charities.

The part of the law that deals with the dynamic aspect of personality when the subject of rights is a corporation does not present any peculiar difficulty. Let me pass on to the more complicated questions, based on the theory of Mortmain, in relation to Corporations. If I were dealing with the history of comparative legislation I might, in this connection, go over some very interesting chapters of Roman,

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(1) *University of Bombay v. Municipal Commissioners of Bombay*, I. L. R. 16 of Bom. 217. Tagore Lectures, 1898, p. 231



Continental and English law. But our immediate object is to know the modern law of Corporations specially as it obtains in British India. All therefore that one can do with regard to general topics in Corporation Law is to consider what characteristics the original possesses of which the Indian Law is a copy.

I have introduced this portion by remarking that the law regarding acquisition and alienation of land is more complex than that regarding acquisition and alienation of personalty. You will concur with me on this point when I say that the modern law on this topic is to be found partly in the Mortmain Acts of 1888 and 1891, and partly in the numerous statutes of the 19th century intended to regulate the affairs of particular classes of corporations. True the Mortmain Act does not apply to India and here the only special Acts are those regarding the dealings of Municipal corporations, Joint-Stock Companies, the Indian railways and the Universities, yet the subject is as much complicated as its English prototype by the presence of special regulations affecting endowed charities some of which are of corporate nature. Later on the law of endowments will be discussed in so far as it bears on corporation law. At present, I shall notice briefly the connection between Mortmain and corporate property.

I am not going to repeat the long History of Mortmain in English Law, but certain

fundamental points in this complicated branch of law should be borne in mind in order to appreciate the development of the law regarding corporate property, specially immovable property. In English law of real property, you know perhaps that the central feature is tenure. The feudalism of the political history impressed itself with a vigour unknown to other legal systems on the law of land tenure in England. The whole doctrine has thus been summarised by Maitland. The general formula that expressed the condition of tenure was A holds of B in consideration of a service C. This service might be of any kind, free or unfree varying from the merest show to the strictest and most onerous duties. The duties which the tenants owed the landlords marked and constituted the nature of the tenure. Even after tenure ceased to possess political and military importance, the incidents of tenure remained a most remarkable feature of land holding. The tenant owed fealty and homage which might not directly bring in profit to the landlord, but there were, in addition, the incidents of relief, wardship, marriage and escheat which directly resulted in benefits of various degrees. Thus Littleton has it that if a tenant holding by the service of a Knight's fee died, his heir being then of full age, the lord might have hundred shillings for relief. On the other hand if the tenant died leaving an heir under age, until the heir came of

age the lord might hold land and was not compelled to account for profits. He was moreover entrusted with the person of the heir, in the case of a boy until the age of 21 or death, in the case of a girl until the age of 16 or marriage. The marriage of such an heir was a source of profit. Again the land might escheat, *i.e.*, go back to the landlord, subject to certain rights of the King, on attain for treason or outlawry or on failure of heirs. Now a corporation never allowed the landlord to profit by any of the causes enumerated. It never died leaving an heir under age, it never married nor did it give any opportunity to escheat. Consequently every corporation holding land constituted a nuisance in the eyes of the landlord. The greatmen of the state were landlords and they tried hard to prevent corporations from becoming owners of real property. The Magna Charta of 1217 in the reign of Henry III provided that "it is not to be lawful for any man henceforth to give his land to any house of religion, so as to take that land again to be held to the same house. Nor is it to be lawful for any house of religion so to take the land of any as to give it back to him of whom the house received it. Now if any henceforth shall give his land to hold to any religious house and on this be convict, the gift is to be utterly void, and that land is to accrue to the Lord of the fee." This was the first statute that gave

rise to the principle that alienation of land to religious houses and other corporations was bad. Although certain corporations sole that came within the definition of religious house were allowed to hold land of the King or Mesne Lords, by free pure and perpetual alms, these did not constitute an exception to the rule laid down by the statute because the tenure here was of a spiritual king. It was the intervention of supernatural considerations that saved the frankalmoign from the might of the Magna Charta. The legislature, however, kept the perpetual watch against the springing of new-fangled institutions that might devise further means of defeating the aim of the Great Charter of Henry III. A series of acts culminated in the passing of the famous Statum de Religiosis of Edward I (1279) where the word Mortmain first appeared in the clause that provided that no one under colour of gift or lease or any other title whatsoever shall receive lands and tenements from any one or in any manner whatsoever by ingenious device appropriate them to himself, on pain of forfeiture of the same, whereby such lands and tenements come into Mortmain, (*per quod ad manum mortuam*) in any way (1). Henceforth the land falling into the hands of a corporation is said to fall into Mortmain—the dead hand either because the

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(1) Carr—On Corporations, p. 38, *Vide do* for Coke's Explanation of the term Mortmain. The following portion is from the same authority p. 39

religious bodies became persons civilly dead when they enter their profession or because the land became dead to the landlord from the view point of personal profit. This statute govern the alination of land into Mortmain till it was replaced by the Mortmain Act of 1888.

Let us consider the general principle laid down in this act in order to find out the connection in modern law between Mortmain and corporate property. The very first section of the first part of the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. C. 42) says that land shall not be assured to or for the benefit of a corporation unless proper authorities have given a license for such alination. This enactment applies to all corporations aggregate or sole ecclesiastical or lay except such trading corporations as have powers to buy or sell lands for their immediate purposes. The alienation of land to a corporation is a ground for forfeiture unless the holding of the land is specially authorized by the crown or by the statute creating the corporation. This proviso has, however, brought in more exceptions than the general principle would seem to indicate. In fact the Companies under the Companies Acts are exempted by S. 16 (2) of the Consolidating Act of 1908, the only restriction being that companies formed for non-mercantile purposes cannot hold more than two acres without the consent of the Board of Trade. The Municipal Corporations are also exempt from the

operation of this statutory rule, nor are the Universities and Colleges subject to it. Now in modern times these bodies form the majority of corporations, so the residue that is left for the use of the statute is very small indeed.

I have so far dwelt on the statutes relating to alienation of lands to a corporation. What about alienations by a corporation? This is a question that has been variously answered by various authorities. Of course the difficulty appears only in connection with common law corporations, because the modern statutory corporations have their powers defined by the statute and consequently can present little difficulty in most cases. With regard to a common law corporation Sir Edward Coke thought, if a passage in the Suttons Hospital case be trusted, that it might do with its property what an individual might do. Kyd writing towards the end of 18th century took the same view. Brice maintains an opposite view, while the authors in Halsbury's Laws of England support Kyd. Modern cases are not very decisive on the point. In *Evan v. Corporation of Avon* the Master of Rolls said "*Primâ facie* an ordinary Municipal Corporation if not within the Municipal Corporation Act has full power to dispose of all its property like any private individual" (1). Blackburn, J. remarked in *Riche v. Ashbury Railway Carriage*

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(1) (1860) 29 Bevan, 149.

Co. "The Leading authority on this subject (Alienation by a Corporation) is the case of Suttons Hospital. The King by the incorporating charter not only did not in express terms give power of alienation but by express negative words forbade any alienation except by lease" (1). Thus the authorities differ on the point in question. But it may be mentioned that now a days the question whether corporations have an inherent power of alienating their lands is purely of theoretical interest because in any case where it can actually arise the answer would depend on other concrete facts attending the circumstances of the case. For example where property is held on trust by a corporatin alienation in such a case would be governed by Charitable Trusts Acts. In the case of Municipal Corporations the power to alienate is governed by special acts bearing on the Municipalities. Again in the case of Railways the question is dealt by the Railways Act. Thus one need not devote much time to a probelm that has an abstract existence not narrowly connected with the concrete realities of law.

As for leases it seems that the common law allows a corporation to lease its lands, but mediaeval legislation from 1285 onwards is much occupied with placing this power under statutory regulation. At the present

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(1) 9 Exch., p. 263.

day the acts which govern the sale of corporate land invariably deal also with the conditions on which leases may be granted. Thus the Municipal Corporations Act of 1882 confers on the English municipalities the power of leasing municipal lands subject to certain preliminary supervisions by the commissioners. The Bengal Municipal Act authorizes the Commissioners to take on lease or sell, let, or exchange any land for the purposes of this Act. (1)

In the absence of express restriction a corporation has the implied power to take a lease of real property. Sometimes this power like the divestitive one of leasing away property is definitely given as in the Indian Municipal Act. A corporation, however, cannot take a lease of property for a purpose foreign to the objects of its incorporation. Whether a particular transaction is connected with the purposes of a corporation would depend on the circumstances of the particular case. *e.g.* it has been held that a turnpike company may take a lease of premises for the purpose of storing the implements used in repairing its road and of sheltering its employees. (2)

It may be noticed that in all the above cases a corporation may convey its property

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(1) Bengal Municipal Act, S. 34.

(2) *Crawford v. Longstreet* 43 N. J. Law, 325.



not only absolutely, but also lease it subject to such qualifications as would make the alienation *intravires*. Thus a Railroad Company owning land which is not at the time necessary for the operation of its road, may lease the same to individuals for the purpose of erecting and maintaining an elevator thereon to be used in connection with its road. Again a religious educational, literary or scientific corporation or any other corporation owning lands and buildings for use in connection with its business may lease the same or any portion thereof when not necessary for its own purposes. It has been suggested that on the same principle "it is within the powers of a Railroad Company to let another Company into the joint use and occupancy, for a long term of years, of its bridge, and of its station, tracts and other terminal facilities at a particular city, when such joint use and occupancy does not interfere with its own present or prospective use thereof or its ability to discharge its duties to the public." (1)

You have noticed that so far I have mentioned the instances where a corporation is allowed to deal with property belonging to it because such a transaction is connected with the objects of its creation. The Railway Companies are authorised by the Indian Rail-

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(2) *United Pacific Railway Co. v. Chicago Rock Island, etc.* 51 Fed 309.

ways Act to acquire lands for the construction works or accommodation works. So also the Municipalities in India are allowed to acquire land for Municipal purposes.

But there is one class of ownership unconnected with the purposes of a corporation that is allowed to a corporation aggregate or sole, *viz.*—the trust ownership. As a general rule a corporation may hold property on trusts which have no connection or relation to the purposes for which the corporation exists either alone or jointly with one or more individuals. At one time, however, it was supposed, no doubt under the influence of Coke, that a corporation could not be “seized of lands to a use.” The doctrine of uses was responsible for the trend of legal reasoning that denied a corporation the power to hold lands in trust. The Statute of Uses 1535 enacted that under certain conditions a use should be executed and the lawyers supposed that all uses were matters of conscience, a corporation having no conscience could not be seized of lands to the use of another. But all this is obsolete now as *re Thomson’s Settlement Trusts* shows. This being a most important decision concerning the topic that I am discussing it is necessary to go into the case a little minutely. A marriage settlement contained a proviso in the following terms—“if the trustees hereby constituted or either of them

or any trustees or trustee as hereinafter provided shall die or be abroad or desire to be discharged or refuse or become incapable to act them and in every such case it shall be lawful for the husband and wife or the survivor of them and after the death of each survivor for the surviving or continuing trustees or trustee for the time being or for the acting executors or executor administrators or administrator of the last surviving trustee to appoint a new trustee or new trustees in the place of the trustee or trustees so dying or being abroad or desiring to be discharged or refusing or becoming incapable to act as afore said and upon every or any such appointment the number of trustees may be augmented or reduced (but so that in no case shall the number be less than two) and upon every such appointment the trust property shall (if and so far as the nature of the property and other circumstances shall require or admit) be transferred so that the same may be vested in the trustees or trustee for the time being." One of the trustees having died the husband and the wife proposed to appoint a corporation to be new trustee jointly with the surviving trustee. The question arose as to the validity of such an appointment. Swinfen Eady, J. said "The question raised is whether in the events which have happened the plaintiffs may lawfully appoint the Ocean Accident and Guarantee

Corporation Limited to be a trustee of the settlement to act jointly with the surviving trustee of the same settlement. The settlement contains a provision that if either of the trustees should die, it should be lawful for the husband and the wife to appoint a new trustee in the place of the trustee so dying, and they now desire to appoint the Ocean Company. Undoubtedly corporations may be trustees. In *A. G. v. Landerfield* where a testator had devised real estate to St. Bartholemew's Hospital, the Attorney-General argued that as corporations could not be seized to a use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust; but the report states that the Lord Chancellor would not let him go on, nothing being clearer than that corporations might be trustees. And that the Court of Chancery (now the Chancery Division) will enforce and execute the trusts on which corporations hold property, whether lay or ecclesiastical was established by *A. G. v. St. John's Hospital, Bedford*. Until recently there was a difficulty in a natural person being a trustee jointly with a corporation, as a corporation and a natural person could not hold property as joint tenants, but only as tenants in common. The law in this respect has, however, been altered by the Bodies Corporate Joint Tenancy Act, 1899 (62 & 63

Vict. C. 20) which provides that a body corporate shall be capable of acquiring and holding any real or personal property in joint tenancy in the same manner as if it were an individual; and where a body corporate, and an individual, or two or more bodies corporate, became entitled to any such property under circumstances or by virtue of any instrument, which would, if the body corporate had been an individual, have created a joint tenancy, they shall be entitled to the property as joint tenants." (1) So it is definitely settled that in modern law a corporation just like an individual can hold trust property. Not only can a corporation become a sole trustee, but also a joint trustee. Here then the theory of corporate personality has met with a practical application in the law of trusts. The corporation is treated by the court as a fully capable legal person so far as trust matters are concerned. (2)

I pass on to the contractual rights and liabilities of corporations. Here again the authorities for the general principle are the English and American decisions. In India the statutory corporations have contractual rights and liabilities fixed by the statutes of creation. The indigenous corporations, however, form a

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(1) (1905), 1 Ch 229.

(2) Carr—On Corp. Chapt. IV.

class by themselves and cannot easily be brought in line with the modern ones as we shall see later on. Hence we must rely on foreign authorities as in the previous parts of our discourse.

The rules regulating the contracts of group bodies are divisible into two classes (1) those relating to the form (2) those relating to the capacity of bodies to contract. The first class of rules may be taken up first. As regards the formality most of the text writers are of opinion that contracts by corporations are to be authenticated subject to certain exceptions by the common seal. Blackstone for example says "A corporation being an invisible body cannot manifest its intentions by any personal fact or oral discourse: it therefore acts and speaks only by its common seal." Grant says "a corporation aggregate expresses its will wherever strangers are concerned, by its common seal, and in general nothing of importance can be done by a corporation except under its common seal." Sir William Anson remarks (3) "a corporation aggregate can only be bound by contracts under the corporate seal, to this rule there are certain exceptions." I have already told you about the exceptions to the general rule in the discussion on the nature

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(1) (1905), 1 C. G. 229.

(2) A. G. v. Foundling Hospital Governors, (1793) 2 Ves. 42, 46.

(3) Law of Contracts, 13th Ed., p. 74.

of corporate seal in connection with the incidents of a corporation. All that it is necessary to remind ourselves is that although it is somewhat unsatisfactory to learn a general rule and then find out exceptions which by their multiplicity very nearly drown the general principle, yet one must adopt the course as it is because the exceptions have grown out of the general rule, in fact they are organically connected with the general rule. Moreover the growth of law has always been this wise; it is not geometry that we are dealing with where one may start with certain definitions and postulates and deduce all the consequences therefrom. We are dealing with the facts that have arisen in a natural order and no amount of partiality for symmetry can displace the apparent disharmony by an absolutely logical fitness. Again if we try to reverse the statement of the rule and treat the contracts which must be under seal as exceptions we shall be landed in an inextricable confusion. So the rule must be stated as it has been done.

"The seal is the only authentic," said Rolfe B. in *Mayor, etc., of Ludlow v. Charleton*, "of what the corporation has done or agreed to do. It is a great mistake therefore to speak of the necessity for a seal as a relic of ignorant times. It is no such thing. Either a seal or some substitute for a seal, which by law shall be taken as *conclusively evidencing* the sense of

the whole body corporate, is a necessity inherent in the very nature of a corporation." (1). Here you observe that stress is laid on the evidentiary value of the seal. This has been regarded so great here as to make the seal a *sine qua non*, an inseparable accident of a contract by a corporation. This view, however, has not been endorsed by more modern decisions. Lord Justice Cockburn said (2) in *South of Ireland Colliery Co. v. Waddle* that the seal is a relic of barbarous antiquity. In America also the same view prevails. The great majority of cases where corporate acts can be performed without a seal seem to warrant the more modern view that the seal is not a necessary incident of a juristic act performed by a corporation. From the very earliest times as I have pointed out to you in a previous lecture exceptions to the rule of the seal, if one may so term the law regarding authentication of a corporate act, have been recognized, e.g., in *Wells v. Mayor*, etc., of Kingston on Hull where the corporation as owner of the dock was allowed to enter into daily agreements necessary for the admission of ships into the dock without the formality of a corporate seal, the exception to the general rule was patently recognized. The principle of the decision being the facility of work that

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(1) (1840), 6 M. & W. 875.

(2) (1869), L. R. 4, C. P. 617.



would otherwise be impossible if every item of minor importance or daily occurrence were to be authenticated by a seal. A further exception was dictated by the principles of common honesty. Instances have not been rare where corporations have benefitted under a contract and then refused to perform its own part because the contract was not under seal. In such cases to prevent the corporation from getting an undue advantage the courts have ruled that work actually done and accepted must be paid for, provided the contract is connected with the purposes for which the corporation exists, even though the contract is not under corporate seal. I may take the important case of *Lafford v. The Billericay Rural District Council* as an illustration of the point under consideration. In this case action was brought to recover from the defendants remuneration for services rendered at their request by the plaintiff as an engineer in preparing a report and plans with regard to a scheme of sewerage contemplated by the defendants and for other work than in connection therewith. It appeared that prior to the matters to which the action related the plaintiff had been acting as engineer for the defendants under an agreement under their common seal in respect of certain sewerage works carried out by them and known as the *Shenfield Hutton Scheme*. It having

been discovered that the drainage of a portion of the district not included in the original scheme was defective, the consideration of this matter was referred to a committee and the committee passed a resolution that the plaintiff should be requested to visit Shenfield Common, the place in question and report as to the work that was necessary and the probable cost. The plaintiff accordingly visited the place, made a survey and sent a report and estimate to the committee. He was then instructed by the committee to act as engineer in respect of the Shenfield Common extension work. The services that he would have to perform as engineer were to prepare plans, specifications and other documents, to attend at any local enquiry held by the Local Government Board, to obtain tenders for the work and to superintend it as it was carried out. A correspondence passed between the clerk to the defendants and the plaintiff with regard to his remuneration, but there was no agreement under seal relating to the employment of the plaintiff. With the exception of the correspondence above referred to, the plaintiff was in communication throughout with the committee, but the various resolutions passed from time to time by the committee with regard to the employment of the plaintiff were submitted to and approved by the defendants. The plaintiff carried out the necessary duties arising from his position

as engineer in respect of the Shenfield Common Sewerage Extension Scheme, including attendance at a Local Government Board enquiry, at which the scheme was sanctioned and the taking out of quantities and the procuring of tenders. None of the tenders were accepted, and a difference of opinion having arisen as to the amount of remuneration to which the plaintiff was entitled, the defendant declined to pay the amount which the plaintiff claimed to be due to him upon the terms of the agreement contained in the correspondence. The plaintiff thereupon brought this action, in the course of which it was not disputed that the plaintiff had received instructions to do the work, or that work of the nature of that done by him was essential where sewerage works were in contemplation by a local authority; but it was contended that there being no agreement under the common seal the plaintiff could not recover in the action. The learned judge took that view, and gave judgement for the defendants. The plaintiff appealed. In the Court of appeal Vaughan Williams, L. J. said "it is right that I should call attention to the fact that the rule regarding corporate seal does not apply in the present case where there was no single antecedent contract, but a series of orders. It is clear that a contract to pay has been implied in many cases in which there has been no contracts under seal, because

consideration was executed, and benefit accepted. The exception based on executed consideration is not of recent origin because it was recognized by Lord Denman in *Doe d'Penington v. Tanriere*, where it was said "where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. That is by no means inconsistent with the rule that in general a corporation can only contract by deed; it is merely raising a presumption against them, from their acts, that they have contracted in such a manner as to be binding upon them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case." Although expressed in a different way, I take it that Lord Denman in effect says that reliance may be placed on an implied contract arising from an executed consideration and acceptance of the benefit of the contract. Under the circumstances our proper course is to give judgment in favour of the plaintiff"(1)

Mathew, L. J. said "I am of the same opinion and I only desire to add a few words. It is said that in two classes of cases, the one

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(1) (1903), 1 K. B., p. 783, etc.

where the work done for a corporation is of a trivial nature, and the other where it relates to matters of frequent occurrence, the general rule that a corporation must contract under seal does not apply. It is argued for the defendants that from this point of view there is an end to this claim, because it cannot be held to come within either of those classes. On the other hand it is said that there is a third exception to the general rule. That exception is that where work is done or services are rendered at the request of the corporation in respect of matters for the doing of which it was created, and the benefit of the work or services is accepted by the corporation so that a contract to pay would be implied in the case of a private person, a similar implication would be made in the case of a corporation. Cases have been cited on one side and the other in support of these views. For the defendants a series of cases have been cited in which the rule as to the necessity for a contract under seal was applied without regard to the acceptance by the corporation of the benefit of the contract. As against the view of the law on which those decisions were graced, another principle was clearly growing up, *viz.*, that upon which the plaintiff relied as a third exception to the general rule. This appears from Lord Ellenborough's decision in the case of *Yarborough v. Bank of England* followed by *Hall*

v. Swansea Corporation, where an action was brought to recover money of the plaintiff received by the corporation and retained by them." Upon the review of the cases the Judge came to the conclusion that the whole weight of authority was in favour of holding the defendant corporate body as liable on the contract and so the appeal was allowed.

So far as the form of contracts is concerned it appears that modern decisions are tending to establish a symmetrical principle. Whenever there is a chance of dishonesty prevailing through a technical device the courts are careful to prevent miscarriage of substantial justice. And this in spite of an English Act which brought in a disturbing element. The Public Health Act of 1875 requires imperatively that the contracts of Urban authorities which exceed £50 in value shall be under the corporate seal. According to the House of Lords this Act authorizes non-payment by Urban authorities even in cases where the full benefit of the contract has been received. Lord Blackburn said "it is true that this works great hardship upon some persons. It is, however, for the legislature to determine whether the benefits derived by enforcing a general rule are, or are not, purchased too dearly by occasional hardships. A court of law has only to enquire what has the legislature thought fit to enact"? Lord

Bramwell gave a common sense interpretation of the decision when he said that the decision might be hard on the plaintiffs who might not have known the law, but "they and others must be taught it, which can only be done by its enforcement (1). Notwithstanding the deviation marked by the statute just mentioned the general tendency even in the case of Parliamentary Acts regarding corporations is to widen the sphere of their liability on contracts, *e.g.*, by S. 37 of the Companies Act of 1867 companies incorporated under the Act of 1862 were placed nearly on the same footing as ordinary individuals so far as the form of contracts is concerned. It may be worth while quoting the sub-section governing the contracts on behalf of a company, as it stands in the present Companies Act, because the corresponding section in the Indian Companies Act (2) of 1882 is, but a reproduction of the English Law :—(a) Any contract which if made between private persons would be by law required to be in writing and if made according to English Law to be under seal may be made on behalf of the company in writing under the common seal of the company, and may in the same manner be varied or discharged. (b) Any contract which if made between private persons would be by law required to be in writing,

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(1) *Young Co. v. Mayor, etc., of Leamington*, (1883), 8 A. C. 517.

(2) Act 6, 1882, S. 67.

signed by the parties to be charged therewith, may be made on behalf of the company in writing signed by any person acting under its authority, express or implied and may in the same manner be varied or discharged. (c) Any contract which if made by private persons would by law be valid although made by parol only, and not reduced into writing, may be made by parol on behalf of the company by any person acting under its authority, express or implied and may in the same manner be varied or discharged. Thus you see that this last provision in the S. 67 of the Indian Companies Act has tended towards bringing in a uniformity in the law of contracts. In certain cases no difference is maintained between a natural legal person and a group person in the eye of the law. It has been observed that as companies form the great majority of modern corporations, the corporations to which the old rule regarding form of contracts applied are insignificant in number; and even in their case the application of the principle has been greatly restricted (1).

I may now take up the principles that govern the substance of contracts so far as the corporations are concerned. You know of course that the legal capacity for juristic acts is the result, in every legal system of positive

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(1) Smith—*The Law of Associations*, p. 27.



rules. Thus in Roman Law certain contracts classed as *Verbis* were enforceable because set forms of words had been used while entering into those specific contracts. The rule of positive law required that the parties should have legal capacity for pronouncing those words at the right moment. In English Law likewise certain persons are denied the power of entering into contracts on account of their age or condition of health. Besides the subjective tests enforced more or less in all civilized systems there are certain objective tests for ascertaining the legality or otherwise of contracts, *e.g.*, certain classes of agreements have no validity at law because they are either immoral or against public policy. Then again the status of persons has an important bearing on the freedom of contracts between certain parties, *e.g.*, modern legislation has greatly affected the contractual liberty between master and servant in cases where the employment is of manual labour.

The rules restricting the liberty of contracts have always been dictated by considerations of policy. The variation in them is due to different notions of policy at different times and in different countries. After all legal capacity even in the case of natural men is, but a consequence of legal rules framed by the legislative sovereign. Hence the variation in the capacity for juristic acts is always connected with the

variation in the legal doctrine sanctioned by the sovereign. On the theory that corporate personality is a privilege flowing from the state, any conditions or restrictions may be attached to the gift that comes from the state by latter when desirable. Thus different rules govern the questions regarding capacity to contract so far as corporations are concerned, the rules depending on the source of incorporation. In the case of corporations created under the common law by the crown it appears that in general such a corporation can enter into all those contracts which are lawful to a natural man except those which from the very nature of the case are impossible for a group body; if any restrictions are imposed they must in the case under consideration be sought for in the charter of incorporation. So Grant remarks "the crown may even impose in the charter restrictions upon the incidental rights, privileges and powers of corporations; but if it does not, then immediately on the corporation being erected all the incidents of corporations immediately attach; and all other powers which a corporation exercises must be contained in the charter or claimed in virtue of immemorial usage or prescription which supposes a grant by a charter which has been lost (1).

When the corporation is created by an Act of Parliament its contractual capacity is

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(1) Grant—On Corporation, p. 13.

narrowly limited. Nothing is lawful to such a corporation except what is expressly or impliedly allowed by the Act. Let me take two important cases in illustration of this rule. The first is an old case decided in 1855. It is known as *Eastern Counties Railway Case*. This was an appeal brought by the Directors of the Eastern Counties Railway Co. against a decree pronounced in favour of Hawkes the respondent in a suit which he had instituted under the following circumstances. The Eastern Counties Railway Co., had been incorporated under a general Act for the purpose of making a line of Railway from London to Norwich. In the year 1847 the Directors of that Company applied to Parliament for the purpose of obtaining powers to construct a branch railway from Wisbeach to join the Great Northern Railway at Spalding. This projected line was called throughout the proceedings the *Curvilinear Diverging line*. Plans and sections of this proposed line were deposited in the usual manner showing its intended course. It appeared from these plans and from the limits of deviation marked on them that the line would pass very near the respondent's property of which the appellants proposed to take a considerable portion, including a part of his mansion house and conservatories. The respondent presented a petition in opposition to the bill. The appellants in order to induce

him to withdraw his opposition entered into an agreement with him, sealed with the seal of the company by which they agreed to purchase his premises for £8,000, to be paid within 18 months after the Bill should pass, and to pay him a further sum of £5,000 as a compensation for his compulsory eviction from his property, and all the costs of making out a title. It was also proposed that the appellants would construct another line called the direct diverging line in such a manner as to form a junction with the A. N. and B. Railway at Spalding. The Act expressly prohibited the making of the proposed direct diverging line. In March 1848 the respondent delivered his abstracts of title and in the autumn of that year he quitted his mansion at Spalding. In November 1848 the solicitor to the company wrote to say that the appellants thought of abandoning the Wisbeach and Spalding Railway and proposed that the respondent should keep his property and receive compensation. The respondent insisted on the completion of the contract. After much correspondence he filed his bill in the Court of Chancery in which he set forth the above facts and prayed for a decree for specific performance. The Vice-Chancellor Knight Bruce ordered that the contract should be specifically performed. Against that order the appeal was brought. The Lord Chancellor said among other things

that one of the points insisted on by the Appellants was that the contract was one into which they had no power to enter because it had been made for an object not within the scope of their original constitution. "That object was the purchase of land for the purposes not of the original line, but of a new line, which new line at the date of the contract they had no authority to make. From the cases already decided it appears that the rule is firmly established that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however, desirable such an application may appear to be." (1) Although the case was decided on other principles it is an authority for the fundamental rule regarding the contractual limit of a statutory corporation.

The next case is the case of *Ashbury Railway Carriage Co. v. Rictre* decided in 1875. The facts were shortly as follows:—A company was registered under the Joint-Stock Companies Act, 1862. Its objects, as stated in the memorandum of association were to make and sell or lend or hire railway carriages and wagons, and all kinds of railway plant, fittings, machinery, and rolling stock; to carry

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(1) (1855), 5 II L. C. 331 (Clark's).

on the business of mechanical engineers and general contractors; to purchase, lease, work and sell mines minerals, land and buildings; to purchase and sell timber, coal, metals or other materials and to buy and sell any such materials on commission or as agents. The directors agreed to purchase concession for making a railway in foreign country and afterwards agreed to assign the concession to a French Company. After much discussion it was held that such an agreement was void. Lord Selborne said "the action in this case is brought upon a contract not directly or indirectly to execute any works, but to find capital for a foreign railway company in exchange for shares and bonds of that company. Such a contract in my opinion was not authorized by the memorandum of association of the Ashbury Company. The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations. The memorandum of association is under that Act their fundamental, unalterable law; and they are incorporated only for the objects and purposes expressed in that memorandum. It was so held in the case of the East Anglian Railway Co., and in other cases upon Railway Acts which cases were approved by this House in the Eastern Counties Railway case; and I am unable to see any distinction for this purpose between

statutory corporations under Railway Acts and statutory corporations under the Joint-Stock Companies Act of 1862." (1) It may be added that a company authorized by statute to borrow money up to a certain amount cannot incur on the principle just stated a debt for a larger sum.

The principle laid down in the above English cases has application in Indian Law whenever the contractual limit of Indian Companies becomes a subject for discussion. As most of the modern companies in British India are governed by the Indian Companies Act and the Indian Railways Act they may be taken as types of statutory corporations modelled on their English prototypes.

Another point worthy of notice is that a corporation as such has no implied power of borrowing money nor is it entitled to incur any liabilities upon Negotiable Instruments except that it may draw cheques upon its current account at the bank. "A borrowing power may of course be conferred by the instrument of incorporation and if so it is usually limited in quantity and any one lending money to the corporation in excess of the authorized sum does so at his own risk." (2) Thus in the River Dee Company case where the company was empowered to borrow upon mortgage of

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(1) L. R. 7 H. L. 693.

(2) Smith—Law of Association, p. 57.

lands of the company any sums not exceeding £25,000, and the company borrowed more it was held that the charge on the lands of the "River Dee Company" was invalid (1). When a corporation is formed for trading purposes an implied power both to borrow money and to incur liability is recognized as an essential characteristic of such a corporation (2). But public corporations do not fall under this category.

Sometimes the question regarding the limits of juristic acts is complicated by the presence of a trust. It often happens that property is given to a corporation for the furtherance of certain social aims and a well defined class of individuals become beneficially interested in the administration of such property. The corporation in a like case is bound to observe the limits set not only by the general principles of contract law, but also those determined by the law of trusts. Thus to take an obvious example, if the trust property is administered in such a way that contracts connected with the administration of the property in question benefit persons who are not members of the class contemplated by the donor a breach of trust ensues and the beneficiaries strictly entitled can claim appropriate remedies. It will be seen later on that the

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(1) (1887), 36 Ch. D. 674.

(2) *Bateman v. Mid-Wales Railway Co.*, (1866) 1. C. P. 499.



doctrine of charitable trusts has played an important part in the development of law applicable to corporate and quasi-corporate bodies (1). I now pass on to the rights and liabilities in tort so far as corporations are concerned. It will be necessary to refer to some historical questions in order to follow the development of law in this particular.

In the introductory lecture, I have referred to a decree pro-pounded at the second council of Lyons in 1245. The opinion of Pope innocent as expressed in the famous council was the basis of general view with regard to the liability of a corporation both civil as well as criminal. Although the modern doctrine of corporate liability has necessarily been extended to include cases not contemplated in the 13th century yet for the source of the legal rule as it obtains now one must hark back to the old times.

When the Pope declared the punishment of corporations to be impossible in certain cases he did not forbid thereby all kinds of punishment. What he did say was that a universitas could not be ex-communicated because a sentence of ex-communication upon a universitas would not be regarded by any one as a punishment executed on a corporate body, but on all the individuals composing it. So

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(1) Free Church of Scotland v. Overtoun, (1904) A. C. 515.

the practical necessity led to the opinion recognized in a decretal issued under the Pope innocent. It is necessary to remember that innocent was not only a legislator, but also a lawyer. He justified and elaborated his doctrine in his famous apparatus or commentary on the first five books of the decretals. There he has shown the reasons for adopting the view that the impossibility of ex-communication does not mean that a corporation was not liable to a punishment of any type. It could not be ex-communicated for in the nature of things it did not satisfy the conditions that must pre-exist in order that ex-communication might be possible. It could not receive communion and consequently it could not be deprived of the power that it did not originally possess, just as one might say that a corporation cannot be divorced because in the very nature of things it cannot marry. "But when English Lawyers went on to argue that because a corporation had no mind it could not be liable for an injury in which malice was essential, they were forcing the obvious distinction into a region where it was entirely irrelevant. If logically worked out the theory would abolish all corporate liability, and not only liability in those cases where the presence of some state of mind had to be proved. Physical acts are of necessity no less purely individual characteristics than are the mental

conditions out of which they arise. Thus an assault or an ordinary libel in which it is not necessary for the plaintiff to prove malice must be the act of an individual no less than a malicious prosecution or a libel where the plaintiff has to prove malice. Even the authority of the individual agent must be given to him immediately by some other individual. So the formula that corporations can only act through agents does not really help us, for the appointment of an agent is in itself an act; and if this act also is performed through another agent the chain of agency seems to become infinite. It would seem in short that if we allow ourselves to wander into the region of metaphysics we are logically driven to a conclusion which would relieve corporations from all liability, not only in tort, but in contract as well." (1) But it is well known that contractual liability was recognized in English law at a very early period. The classical writers such as Coke and Littleton admitted corporate liability in certain definite classes of cases. One must say that the English rule is based upon reasons of policy rather than upon a self-evident action of natural justice. The English law started from the mediaeval stand point, but allowed practical considerations to vary the dogma of the decretalists. To what an extent the modern doctrine differs

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(1) Smith—Law of Associations, p. 60.

from the ancient one is easily seen by comparing the dictum of a judge, in any recent case on torts where one of the parties is a corporation, with the view of a text writer such as Kyd or Blackstone.

A fundamental principle of liability in English Law sometimes makes persons answerable for wrongs which have not necessarily been authorized by them. The reason is practical. The only persons who can be proved to have committed or actually to have authorized unlawful acts or very commonly persons of no means against whom the remedy in damages would entirely be useless. If therefore principals are made liable for the wrongs of their agents only when the latter have been actually authorized to cause injury to others it will be opening a door to fraud ; because nothing will be easier than to conceal the bond that unites the agent and the principal. Consequently men of straw if appointed to cause harm to others would answer the purposes of a dishonest person who might like to cause injury to others without becoming liable for such an injury. Thus the English Law unlike the continental system (1), has not adopted the rule that a person "who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work. The

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(1) Smith, L. C. p. 62.

duty to compensate does not arise if the employer, has exercised ordinary care in the selection of the employee and, where he has to supply appliances or impliments or to superintend the work, has also exercised ordinary care as regards such supply or superintendence or if the damage would have arisen notwithstanding the exercise of such care" (1). In fact the English principle has been extended so widely of late that a solicitor has been held liable for a gross fraud committed by his clerk upon a client wholly for the benefit of the clerk (2). It is clear that the liability for wrongful acts is independent of any question of moral blame. At least this is the law in England. And it may be said that here in India the same principle obtains because there is no separate Indian Act governing torts as there is in the case of crimes. The Indian Law of torts is practically the same as the English Law. Therefore, the authority of the English cases may safely be followed where there are no specific Indian decisions.

The fundamental rule regarding the liability in tort is as, I have just now explained, based on practical considerations. In a large majority of cases the question is to determine which of the two innocent parties ought to bear the loss occasioned by the wrongful act of a

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(1) German Civil Code, S. 31.

(2) *Lloyd v. Grace Smith & Co.* (1910) A. C. 710.

third party. No considerations of personal negligence or other moral guilt are allowed to determine the choice as such considerations entail miscarriage of substantial justice. Of course it is agreed that the actually guilty parties must pay, but if it happens that the party who is morally to blame is unable to pay, then the liability has to be shifted on to another independently of the fact that the latter was morally blameless. If this be so the perplexing questions, that from time to time have arisen, regarding the moral guilt of a corporate body, and the difficulty of imputing malice to it, appear to be based on a metaphysical theory foreign to jurisprudence. In fact the unhappy term malice has caused trouble in cases which would have been perfectly simple, but for the application of this variable word. Thus in *Citizen's Life Assurance Company v. Brown* it was held by the Privy Council that "that a corporation cannot be said to be incapable of malice so as to be relieved of liability for malicious libel when published by its servant acting in the course of his employment." In this case the doctrine of malice gave the judges in the Supreme Court of New South Wales some trouble when they tried to apply the general doctrine to a corporation. But the Privy Council Judges took a practical view and ruled out the speculative problems as irrelevant. Lord Lindley in delivering the

judgement of the court said "if it is once granted that corporations are for civil purposes to be regarded as persons, *i.e.*, as principals acting by agents and servants it is difficult to see why the ordinary doctrines of agency and of master and servant are not to be applied to corporations as well as to ordinary individuals. These doctrines have been so applied in a great variety of cases, in questions arising out of contract, and in questions arising out of torts and frauds; and to apply them to one class of libels and to deny their applications to another class of libels on the ground that malice cannot be imputed to a body corporate appears to their Lordships to be contrary to sound legal principles. To talk about imputing malice to corporations appears to their Lordships to induce metaphysical subtilities which are needless and fallacious." (1)

The theory of corporate liability in torts is clearly connected on modern view with the theory of liability of principals for the acts of agents or of masters for the acts of their servants. In either case the doctrine of negligence has given place to the doctrine of insurance against wrongs of a specified type. As it was remarked in *Barton's Hill Coal Co. v. Reid* that the master is put in the position of being compelled to guarantee third persons against all hurt arising from the carelessness of those acting

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(1) (1904) A. C. p. 426.

under his orders in course of his business (1). In the case of corporations it is this doctrine writ large. The corporate liability is the result of the application of a wider law of agency. The forgetfulness of this simple fact has given rise to unnecessary difficulties in certain cases and has led some to remark that a corporation is not liable if the wrong complained of is an *ultra vires* act. I may take the famous case of *Pulton v. The London and South-Western Railway Co.* which is the source of this misleading statement. There the plaintiff having taken a horse to an agricultural show by the defendants' Railway, was entitled under arrangements advertised by the defendants to take the horse back free of charge on the production of a certificate. The plaintiff accordingly produced a certificate, and the horse was put into a box without payment or booking, and the plaintiff having taken a ticket for himself proceeded by the same train. At the end of the journey the station master demanded payment for the horse and the plaintiff refusing to pay was detained in custody by two policemen under the orders of the station master, until it was ascertained by telegraph that all was right. An action having been brought against the defendants for false imprisonment it was held that the Railway Company had power to apprehend a person

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(1) (1858) 3 Macq., H. L. 266.



travelling on the railway without having paid his own fare, but had power only to detain the goods for non-payment of the carriage; consequently as the defendants themselves would have had no power to detain the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station master to detain the plaintiff on this assumption and they were therefore not liable for this act of the station master. Now it has been supposed that this case seems to exempt corporation from all liability when torts done by them arise out of *ultra vires* acts. But in reality the case is an authority providing a test for determining whether there has been an implied or expressed authorization. "Had the agent authority to do the class of acts out of which the wrong arose? The burden of proving the affirmative rests upon the plaintiff. So in Pulton's case the plaintiff clearly could not show that the station master had express authority to arrest him, and there was no evidence that the company had impliedly authorized him to do an act beyond the powers of the corporation itself." (1)

It is well settled that in case an agent has a general authority to do a class of acts the corporation will be liable if the agent uses that

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(1) Smith—On Associations, p. 67.

authority to the detriment of a third party, for example, if a station master arrests a person on a false charge of travelling without a ticket the railway company will undoubtedly be liable for the wrongful acts of its agent the station master (1).

An important question regarding corporate liability for an act essentially *ultra vires*, but authorized to be committed by an agent, has recently been settled in *Campbell v. Paddington Borough Council* (2). The plaintiff was in possession of a house in London from the windows of which there was an uninterrupted view of a part of a certain main throughfare along which it was announced that a public procession was to pass. One G agreed to take and pay for seats in the first and second floors of the house in order to see the procession. The defendants, a metropolitan borough, in pursuance of a resolution of their council to that effect, caused a stand to be erected across a certain highway (in which the plaintiff's house was situate) to enable the members of the council and their friends to view the procession. This stand was a public nuisance, and it obstructed the view of the main throughfare from the windows on the first floor of the plaintiff's house. G when he saw the stand in process of erection asked to be released from his contract as to the

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(1) *Balley v. Manchester, etc., Ry. Co.*, (1873), L. R. 7 C. P. 415.

(2) (1911) 1 K. B. 869.

seats on the first floor, and the plaintiff thinking it would be unfair to hold him bound, released him. Several other persons came to the house to apply for seats, but when they saw the obstruction refrained from taking seats. In an action by the plaintiff to recover damages for the wrongful interference with the use and enjoyment of her house and the special loss she had sustained by the wrongful act of the defendants it was held that she was entitled to recover as damages the profit which but for the defendant's act she might have made by letting the seats. Avory, J. said "It has been suggested that the defendants, the Mayor, Aldermen and Councillors of the Metropolitan Borough of Paddington, being a corporation are not liable because the Borough Council had no legal right to do what they did and therefore the corporation cannot be sued. This stand was erected in pursuance of a former resolution of the Borough Council. To say that because the Borough Council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council and the resolution of the council is the authentic act of the corporation. If the view of the defendants were correct no company could ever be sued if the directors of the company after resolution did an act which the

company by its Memorandum of Association had no power to do. That would be absurd." The defendants consequently were held liable.

In general the present law regarding liability in tort may thus be summarized. A corporation aggregate is liable to be sued for any tort provided that it is a tort in respect of which an action would lie against a private individual and the person by whom the tort is actually committed is related to the corporation as an agent is related to his principal. Thus an action will lie against a corporation for assault, (1), for negligence, for nuisance, for false imprisonment, for infringement of a patent, for keeping a dangerous animal, for fraud, for malicious prosecution and libel. It is not necessary to prove express authority to commit the tort. It is sufficient to show that an authority to commit the act may be inferred from the nature of the agent's employment; *e.g.* where the secretary of a company fraudulently applied the corporate seal and forged the signature of a director to a certificate, which it was within the course of his authority and duty to prepare and get completed, the company was held responsible (2). In some cases even when there is no authority express or implied the corporation may render itself liable by a

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(1) *Eastern Counties Rail Co. v. Broom*, *Green v. London General Omnibus Co.*, *Joff v. Great Northern Rail Co.*, *Betts v. DeVitre*, *Cornford v. Carleton Bank Ltd.*, *Whitfield v. S. E. Rail Co.*, *vide* :—Halsbury—Laws of England Vol. 8 pp., 386, 387.

(2) Halsbury—Laws of England, Vol. 8, p. 388.

subsequent ratification when the act complained of is capable of being ratified by the corporation. Thus in *Cheetham v. Manchester Corporation* (1) it was held that acts proper to be performed by a corporation aggregate if done by its permanent officials and agents in its name are to be regarded as the acts of the corporation on subsequent ratification. So where a servant of a corporation authorizes a person to take possession of a piece of land belonging to it and subsequently another servant of the same corporation serves him with notice to give up possession it may rightly be left to the jury to infer that both servants are duly authorized by the corporation so to act notwithstanding that no lease or notice or appointment of the servants as agents under seal be produced. Where, however, a corporation acting in exercise of statutory powers commits a wrong which would render an individual liable, the corporation would be exempt from liability if it was clear that the legislature intended to authorize the doing of the act and to render it not actionable.

Correlative to the liability there is the right that empowers a corporation to sue for any tort except for torts of a purely personal nature; e.g. a corporation may sue for a libel affecting its property but not for a libel merely affecting personal reputation, it can maintain

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(1) (1875) L. R., 10 C. P. 249.

an action for a libel reflecting on the management of its trade or business when the words complained of attack the method of conducting the affairs of the corporation, or accuse it of fraud or attack its financial position (1).

So far as the civil law rights and duties of a corporation are concerned it is noticed that the ancient theory has been fundamentally changed. The modern needs have called for an amplification of the older doctrine supported by metaphysical considerations. The tendency is to replace metaphysics by the principle of public policy. This march towards practical ends is apparent in criminal law as well so far as the liability of corporations for crimes is concerned.

Before entering into the question of criminal liability of a corporation it is necessary to advert to certain principles that show the specific difference between the nature of civil and criminal liabilities in general. By the principles of criminal law it is of the essence of a crime that it should be connected with *mens rea*. The doctrine that underlies penal rules is summed up in the dictum *factus non facit reum nisi mens sit rea*. The Indian Penal Code has recognized this principle which developed in England through the course of several centuries. Now in ordinary cases where a

(1) *South Hetton Coal Co., v. N. E. News Association*, Halsbury l.c. p. 390.

specific mentality is necessary for a given class of crimes a corporation may be taken as incapable of such crimes. Thus it was laid down in Sutton's Hospital case (1) that a corporation cannot be guilty of treason. Likewise it has been held that bodies corporate cannot be guilty of murder or incest although the individuals comprising these bodies may be guilty of such felonies (2).

If the principle had been extended indefinitely it would have been impossible for a corporation to be criminally liable in majority of instances where an individual person would be liable. But I have already explained to you that the English system at least has adopted with regard to liability in torts a severe rule which holds a principal responsible for all wrongs committed by his agents acting within the scope of his employment, without considering whether or not any blame attaches in the particular case to the principal himself. One result of this theory has been to make the civil liability of corporations co-extensive with that of natural legal persons. Once, however, a departure from the old track having taken place no reason has restricted a further deviation in order to bring the criminal liability of corporations to nearly the same level with civil liability. The development of the principle of

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(1) (1612) 10 Co. Rep. 23a.

(2) R. v. B. & G. Rail. Co. (1842) 3 Q. B. 223.

criminal liability has been naturally slower than its counter part ; the main reason for this tardiness being the difficulty of getting a satisfactory solution to the apparent vicariousness that seems more perplexing in matters criminal than in matters civil ; for example, in the case of torts the doctrine of agency leading to the theory of insurance served as an explanation of the rule that made no distinction between a corporation and an individual when public policy required that they both should be placed in the same category so far as wrongs are concerned. But when one comes to the question of criminal liability this simple solution is not available. A man in general cannot be punished criminally for the acts of his agent merely on the ground that they were committed in the course of the latter's employment. The liability in criminal matters is of a personal kind and it is well settled that in order to obtain conviction some degree of personal participation must be shown. There is a famous English case (1) which shows that this principle was recognized in England as early as the middle of the 18th century. There the warden of Fleet Prison was indicted for the murder of a prisoner who had been killed by confinement in an unhealthy cell. At the time in question the prison was in the charge of a Deputy appointed by the warden

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(1) *R. V. Huggins*, (1739), 2 *Ld. Raym* 1574.



and the warden was taking no part in the management of the place. The Court of King's Bench held that a verdict of murder could not be sustained. Raymond, C. J. said "he shall answer as superior for his deputy civilly, but not criminally. Because if an act done by an under officer unless it is done by the command or direction or with the consult of the principal, the principal is not criminally punishable for it" (1). The general effect of this doctrine was that until the beginning of the 19th century it was an established rule that criminal liability could not be brought home to a corporate body. So Blackstone says following Coke that a corporation cannot commit treason or felony or *other crime* in its corporate capacity. But such a sweeping statement is untrue in modern law. In fact in the first decade of the 19th century the corporation of Stratford-on-Avon was prosecuted successfully on the criminal negligence of repairing a bridge. Again in the case of The Birmingham and Gloucester Rail. Co., it was expressly recognized that the indictment brought against the company for their failure to build certain arches in compliance with their statutory duties was good notwithstanding the objection raised by the defence that an indictment could not be brought against a

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(1) 10 Rep. 32.

corporation (1). This was decided in 1842. Four years later the famous case of *Great Northern Railway* carried the doctrine a little further. There an indictment was framed against the Great Northern Railway for creating an obstruction on the highway. Defence attempted to distinguish this case from the one decided in 1842. It was argued that an indictment would not lie for active wrong doing because the authority of the *Birmingham & Gloucester Railway Co.* case governs non-feasance merely and not mis-feasance. Lord Denman, however, observed that the principle of the earlier case applied to the one in question because "Many occurrences may be easily conceived full of annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause or ascribe them with more correctness to mere negligence in providing safeguards, or to an act rendered improper by nothing but the want of safeguard. If A is authorized to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge or in the neglect to secure it?" (2)

The law of Blackstone's day is not wholly the law of the present day as the decisions just

(1) (1842) 3 Q. B. 223.

(2) (1846), 9 Q. B. 315

now referred to show. It is true that a corporation cannot be prosecuted for murder, treason, and many other felonies, but it is equally true that in certain classes of crimes where *Mens rea* of the highest category is not necessary for liability, a corporation may figure as an accused and is liable to be punished criminally like a natural person. The cases that determined the line separating criminal liability from criminal non-liability are mostly very recent. It may be useful to notice one or two of these in order to perceive the changes that have been brought about in the doctrine of criminal liability of a corporation. In 1909 the Court in the case of *Hawke v. E. Hulton & Co., Ltd.*, decided that a Joint Stock Company incorporated under the Companies Acts could not be convicted of an offence under S. 41 of the Lotteries Act of 1823. This Act enacts among other things that "if any person shall publish any proposal or scheme for the sale of chances in a lottery, not authorized by the Act of Parliament, such person shall for every such offence be deemed a rogue and vagabond and shall be punished as such." The punishment was imprisonment for the first offence and imprisonment and whipping for a second offence. Under S. 4 of the Summary Jurisdiction Act, 1879 a fine might be imposed instead of imprisonment. Here an information was preferred by Hawke the appellant under 4 Geo.

IV Chap. 60 against Hulton & Co. Ltd., the respondents, for that they on June 3, 1908 in the City of Manchester did unlawfully publish a proposal and scheme for the sale of chances in a certain lottery not authorized by any Act of Parliament, to which, a lottery known as Ideas Lime-ricks contrary to the form of the statute in that case made and provided. The question of law for the consideration of the court was whether the respondents being a body corporate could be convicted as rogues and vagabonds under the Lotteries Act, 1823. Darling, J. said "it is perfectly plain that the word person as used in the Lotteries Act, 1823, might include a body corporate unless a contrary intention appears. The question therefore is, does a contrary intention appear? The intention must be contrary to the supposition that a limited company may be imprisoned, or fined if the magistrate thinks that imprisonment is not an appropriate punishment. The question is mainly one of interpretation, and I have come to the conclusion that a contrary intention does appear. In my view the words "rogue and vagabond" are wholly inappropriate as applied to a limited company. When the Act of George IV was passed the words "rogue and vagabond" meant something definite and certainly did not mean a limited company. The Interpretation Act, 1889 does not say that the word person shall always include corporations.

In my opinion the word "person" in the Lotteries Act does not include a limited company in the sense that a limited company is liable to be brought before any two or more justices of the peace and adjudged rogues and vagabonds"(1). On these grounds it was decided as I have already mentioned that the company could not be convicted as a rogue and vagabond although it might be liable to a pecuniary penalty under another section of the Lotteries Act. You have no doubt observed that the application of the theory of personality had led to this important practical consequence. The next case that I shall take up shows a further development of the doctrine under consideration. In this case *Freeth and Pocock, Ltd.*, a Joint-Stock Company incorporated under the Companies Act was summoned for adulterating milk. Under the Sale of Food & Drugs Act, 1899 it is enacted that every person who in respect of an article of food or drug sold by him gives to the purchaser a false warranty in writing, shall be liable to a fine unless he proves that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true. Lord Alverstone, C. J. said "where a person is capable of giving a warranty that person is liable to a fine. There is no reason why a warranty should not be given by a corporation. It can give a warranty through its

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(1) (1909) 2 K. B. p. 97.

agents and through its agents it can believe or not believe as the case may be that the statements in the warranty are true. A similar point has been raised in cases concerning the liability of a corporation in actions which in the case of an individual would involve an inquiry into a state of mind such as fraud, libel, or malicious prosecution. It is well settled that a corporation may be liable in all those actions" (1). Here we see that principle of liability for criminal acts has been further extended in order to bring the corporations within its limits. It has been remarked, however, that the opportunities of development in this direction have not yet been fully exhausted. Mr. Carr remarks "since it is possible to hold a corporation criminally liable in certain classes of cases which result from negligence it may be that in time the courts will so far extend the principle as to hold a corporation indictable for man—slaughter where negligence causes death"(2). Of course no specific instance can as yet be given from the English or Indian decisions on this point ; but it may be interesting that in Manitoba a laundry company was indicted in 1900 for the man—slaughter of a woman who had been killed by contact with unprotected machinery under circumstances involving the company in criminal negligence.

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(1) (1911), 2 K. B. 836.

(2) Carr—On Corporations, p. 97.

The defendant company was, however, acquitted because the main difficulty according to the law of the land was concerned with the question of punishment. Manslaughter is punishable in Manitoba with imprisonment for life and the judge was unwilling in the absence of precedent to inflict such a punishment on a company(1).

A point to be noticed in this connection is that most of the acts involving criminal liability even when done by a corporation are prohibited by a statute. The principles that settles the liability or non-liability in such cases ought to be of universal application. At least one might say that the rule of English law would be followed if occasion arose in India to determine the question of liability of a corporation under circumstances similar to those that had already prevailed in the English cases. The rule regarding the violation of a statutory condition entailing criminal liability has been well expressed by an American Judge—“when a statute in general term prohibits the doing of an act which can be performed by a corporation and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted on a corporation (e.g. a fine). If the law were

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(1) *R. v. Great Western Laundry Co.*, 13 Manitoba Reports, 66

capable of the construction contended for by the defendant in this case, viz., that the company which had violated a statute regulating the conditions of labour in factory was not liable criminally; the result would be that a corporation in contracting for the doing of any public work would be given a privilege denied to natural persons" (2).

The law regarding penalties for criminal offences so far as modern corporations are concerned may now be summarized as follows—a corporation cannot be indicted for a crime that is punishable with death or imprisonment, but it can be indicted where the punishment is a fine. In the case of offences where certain acts are forbidden by law under a penalty and possibly under a personal penalty in default of payment of a fine and where the offender "is liable to a penalty whether he had any *Mens rea* or not and whether or not he intended to commit a breach of the law, a corporation which in fact has done the act forbidden through its agent or servant is responsible and liable to a penalty" (3).

There are certain matters relating to legal proceedings which are some times discussed under powers and liability of a corporate body, but these topics refer to the detail rather than the principle of the law of corporations, e.g.,

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(2) (1898) 86 Fed. Rep. 304.

(3) Halsbury Art Corporation



such questions as whether a corporation is entitled to prove a debt in bankruptcy proceedings by the affidavit of a person duly authorized by a general power of attorney, whether a limited company may be ordered to give security for costs, etc., need not detain us here. The only topic of general interest in this matter is that of *ultra vires* which will be discussed in a subsequent lecture. I pass on to discuss the question regarding the dissolution of a corporation.

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## NOTE ON LECTURE V.

In connexion with the powers and liabilities of a corporation reference has already been made to the legal capacity (*Rechtsfähigkeit*) of corporate bodies generally. The following remarks of Gierke are worthy of notice.

The corporation as a group-person is clothed with rights and bound by duties. These may be put under three heads :—

(1) *Collective-rights*.—Every corporation grows out of the relationship that it bears to the individuals or united persons that form the collectivity. As a corporation it has collective rights and duties which have no reference to those of the individuals forming the group-body. However varied the different classes of corporations may be they all agree in this characteristic of possessing a corporate right and a corporate duty. All the corporate rights and duties form in their totality the corporate domain. The corporate domain is split up into smaller regions of corporate autonomy, jurisdiction and administration in reference to matters affecting the corporation. Corporation as a corporation consequently is a subject of collective rights and duties.

(2) *Class-rights*.—Every corporation has specific rights and duties that mark out its

position in the class of corporations : Thus the state as a corporation is a subject of public rights. The trading corporations have rights and duties appended to their position as such. The special powers and privileges of private corporations are instances of class-rights.

(3) *Individual-rights*.—Finally a corporation as a person has rights and duties comparable to those of an individual. From this standpoint the corporations may be placed on the same footing with the individuals. Perhaps it is this peculiarity that has led to so much confusion with regard to the reality of corporate personality. On the other hand the realistic theory has no better support than this specific feature of corporate rights which equalises corporations to individuals. (cf. Gierke—*Genossenschaftsrecht*. III. 372).

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## LECTURE VI.

### Dissolution.

The very incident that according to classical writers distinguishes a juristic person such as a corporation from a natural person is the normal immortality of the group-body. At one time this was so much so that it used to be said that even the legal sovereign could not create a corporation at common law for a limited period. In course of time, however, the rigidity of the rule had to be relaxed. With the growth of commerce corporations of different types began to appear and the archaic incident of immortality had to give way under certain circumstances. Although generally speaking there is no reason why a corporation should not last as long as the state that has created it, yet it is found that it is necessary to recognise the extinction of corporate bodies for several reasons. Accordingly the condition of law and fact that ends the capacity of the body corporate to act as such and extinguishes all the legal relations subsisting in respect of that corporate body is called dissolution of corporation. I may proceed, without entering into questions of antiquarian interest, at once to discuss the causes and the general effect of a dissolution so far as modern corporations are

concerned. It is obvious that the rules regarding the causes of the dissolution of the older types of corporations, such as a dean and chapter or a college, are not parallel to those obtaining in the case of more recent corporations like banks, railway companies, etc., but the dissimilarity is apparent in the matters of detail only. Therefore the general rules may be taken up as applying to majority of cases, exceptions being recognised when they call for particular notice.

According to Blackstone a corporation may be dissolved in one of the following ways:—(a) by Act of Parliament; (b) by natural death of all its members; (c) by surrender of its franchises into the hands of the king; (d) by forfeiture of its charter through negligence or abuse of its franchises. In other words some of the methods of extinction may be called natural and others violent. Thus when a corporation gives up of its own will its corporate powers it commits a suicide so to say.

The statement of Blackstone requires modification in the case of modern business corporations because the legislature cannot repeal the charter of a corporation unless the power to do so was reserved when the corporation was created. Again joint stock companies are not necessarily dissolved by the death of members, because the shares of the stock in

such corporations pass on the death of the holders to their personal representatives or legatees. In fact liquidation proceedings and the rule of quo-warranto have necessitated some review of the older doctrine regarding the dissolution of a corporation aggregate. As an example of modification of the classical rules may be mentioned the method of dissolution of a joint-stock corporation. A joint-stock corporation is dissolved in one of the following ways—(a) by an act of the legislature repealing or withdrawing its charter provided the legislature in granting the charter has reserved the power to repeal the same but not otherwise; (b) by the expiration of time limited in its charter for the continuance of its corporate existence; (c) by the happening of some contingency prescribed in its charter; (d) by the failure or loss of some integral part of the corporation, so that it can no longer exist; (e) by a surrender of its charter if the surrender is authorized or accepted by the state; (f) by the forfeiture of its charter in a judicial proceeding by the state.

As the management of corporations under modern systems of law is confided to a board of directors acting through a committee or in conjunction with a supervising council the tendency has grown in almost all countries to adopt more or less similar rules for dissolution. To understand the position that the Indian

system occupies in the modern juristic scheme, it is necessary to pass under review the existing laws regarding dissolution in some of the European countries. In the following trading corporations are taken mainly as illustrating the general principles.

*France.*—The dissolution of corporations is not regulated in the commercial code nor in any succeeding statute. Certain provisions applicable to Associations generally are applicable also to corporations. Thus the expiration of the period when a corporation is expressly created for a limited period effects a dissolution. The general meeting of the shareholders by its power to alter the corporate statutes has the indirect power of accomplishing a dissolution. The law of 1867 provides other methods of dissolution, *e.g.*, in the event of an impairment of the capital stock to the extent of three quarters the directors are compelled to call a general meeting of all the shareholders and the shareholders may then decide whether the corporation shall be dissolved. The general meeting has power to continue the corporation notwithstanding the impairment of its capital. If the directors fail to convene the meeting as provided by law any interested party may demand the dissolution of the corporation before the courts.

Any party may demand a dissolution of the corporation if the number of the share-

holders has been reduced to less than seven and remains so reduced for a period of at least one year. The article 61 of the Law of 1867 requires that all documents and deliberations having for their object the dissolution of a corporation shall be published. Thus publication is essential only in the event that the dissolution occurs through the voluntary act of the shareholders, *e.g.*, a change in the corporate statutes respecting the duration of the corporation. No publicity would, however, seem to be required where the corporation is dissolved automatically, *e.g.*, expiry of time. It has even been doubted whether a decree of dissolution pronounced by a court requires publication (1).

French Law lacks any express provision relating to the process of liquidating a corporation. The general principles of law and such rules as are deducible from the very intent of the liquidation seem to determine the *process*.

In general it may be stated that the court will be governed by the will of the shareholders in the appointment of liquidators, provided there be substantial agreement; in the absence of which the court will appoint its own liquidators. In Paris there exists a syndicate of professional liquidators under the supervision of the Tribunal of Commerce from whose number the liquidators of corporations are customarily chosen.

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(1) Lyon-Ceanet Renault—Manual DeDroit Commercial, p. 245.



The equitable principles developed by the French Courts, not any specific provisions of the statutes, must be relied upon to safeguard the interests of stock-holders and creditors during the period of liquidation. The board of directors continues to exercise its functions notwithstanding the appointment of liquidators. But the courts have held that the functions of the auditors cease as soon as the corporation has entered the period of dissolution (1).

It may be noted that although nothing in the bankruptcy provisions of the commercial Code or in the special Law of 4th March 1889 relative to judicial liquidation, compels a corporation to dissolve in the event of insolvency, yet bankruptcy proceedings may often destroy the every purpose for which the corporation was created, taking away all its property and leaving it a mere shell. Under such circumstances the dissolution of the corporation will be decreed upon the request of any party in interest.

*Germany.*—The causes for the dissolution of a corporation according to the German Commercial Code are—(a) the limitation of its duration as fixed in the articles, (b) a resolution of the general meeting adopted by a majority of three quarters of the outstanding capital stock, (c) the initiation of bankruptcy.

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(1) Lyon-Caen et Renault, loc. cit., p. 909.

proceedings. The Code also speaks of other grounds for dissolution without mentioning them specifically. The commentators have interpreted this to refer to causes such as merger, the abandonment of the *situs* within the state, amortization of all outstanding capital stock.

The nullification of a corporation is to be distinguished from its dissolution although it is expressly provided that for the purpose of liquidation the same provisions apply to nullification as to dissolution. Except in the case of dissolution on account of bankruptcy it is the duty of the managers to give notice to the Commercial Registry that the corporation is about to be dissolved for the specific cause provided by law. In default of such registration of notice innocent third parties are not affected by the dissolution. After the proper basis for dissolution has been established, the corporation exists only for the purpose of liquidation, and is subject to the rules of the code made specifically applicable thereto. Liquidation in the event of bankruptcy is conducted according to the bankruptcy statute.

Liquidation is regularly conducted by the members of the directorate, as liquidators, unless the articles of association or a resolution of the general meeting has designated other persons. Stockholders who have held their shares for a period of six months are protected

against an unfriendly management. Holders of stock for the period mentioned and representing at least one twentieth of the capital stock may, for good reasons shown, request the court to appoint liquidators. The court may under the same conditions remove liquidators already appointed and the general meeting may also recall liquidators not appointed by the court.

The liquidators must notify the creditors to prove their claims and must reduce the property of the corporation to money. The amount left over after payment of debts is divided among the stockholders in the usual way according to the class of the security. In carrying out the liquidation, the liquidators are subject to the same control on part of the supervising council and to the same degree of civil and criminal responsibility as directors of a corporation prior to dissolution. The distribution amongst the stockholders may be made only after notice to the creditors to prove that their claims have been three times published in the official newspaper and one year has elapsed thereafter. If a person known to be a creditor has failed to prove his claim the amount of the claim must be deposited. If a proved claim is disputed or if performance of the obligation is impossible at the time security must be given to the creditor before distribution.

After the liquidation has been completed and final accounting made, it is the duty of the liquidators to give notice to the Commercial Registry of the discontinuance of the corporate title and to deposit the books and papers of the corporation in a place of security to be designated by the court, there to remain for a period of ten years accessible to stockholders and creditors by proper authorization from the court.

A sale in bulk of the property of the company is permissible only on a resolution of the general meeting by vote of at least three quarters of the outstanding shares. A sale in bulk operates as a ground of dissolution even in the absence of other grounds.

German law has anticipated the tendency of corporations to consolidate, at least where this is effected by the acquisition by one corporation of the entire property of another. The German Code establishes a method by which the entire property of one corporation may be acquired by another without the continued existence of the share capital of both corporations, while at the same time it protects the interests of the share holders of the corporation whose existence is to be merged. This is accomplished by raising the capital of the vendee corporation without requiring any payment upon the increased capital other than the transfer of the property of the vendor

corporation ; the consideration for the property passes to the shareholders of the vendor corporation by an exchange of shares, the shares of the vendor corporation thereupon are cancelled and the corporation itself subjected to dissolution.

Adequate protection is given the creditors of the vendor corporation in that its property must be kept apart and managed separately until the creditors have been notified of the consolidation and the same provisions may apply for their benefit as in the ordinary cases of dissolution. The creditors have recourse against the property of the vendor corporation as if there had been no consolidation (1).

*Italy.*—The Italian Commercial Code recognizes the following grounds for the dissolution of a corporation—(1) expiration of the term fixed by the articles, (2) lack or disappearance of corporate purposes or the impossibility of attaining them, (3) accomplishment of the purposes for which the corporation was formed, (4) adjudication in bankruptcy, even though accompanied by a composition, (5) loss of the entire capital or of a considerable part thereof unless the shareholders agree to make good the loss or limit the capital to the assets remaining, (6) consent of the share holders, (7) consolidation.

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(1) German Commercial Code, S. 306.

In the event of a consolidation of two corporations the documents effecting the same must be published in the same manner as the articles of incorporation. Both companies must publish their final balance sheets according to a uniform plan, and the company to be merged must add a statement of manner in which it is proposed that the debts shall be paid. The consolidation does not become effective, however, until three months thereafter, unless all the creditors have consented, or all the debts have been paid or a sum sufficient to cover them has been deposited. During this period any creditor may oppose the consolidation; its execution is thereupon suspended until opposition is withdrawn or overruled by a judicial decree from which no appeal has been taken.

When a corporation is undergoing dissolution, liquidation proceeds according to the provisions of the articles or corporate statutes. The general meeting appoints the liquidators (1). After publication of the resolution of the general meeting or decree of the court ordering the dissolution, the directors are prohibited from entering upon any new transaction, under penalty of personal responsibility. Actions for and against the company must be conducted by or against the liquidators. All documents

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(1) *Annali della giurisprudenza*, Vol. 20, Part I, p. 487.

must recite that the company is in liquidation. The provisions of law, of the articles, and of the corporate statutes, continue to regulate the affairs of the company wherever consistent with liquidation, and the liquidators are under the same responsibilities as were the directors. The liquidators must, with the co-operation of the directors immediately prepare an inventory and balance sheet ; they must obtain and preserve the books kept by the directors ; they must keep account chronologically of all their transactions relating to liquidation and, upon demand of the shareholders, give information of the condition and progress of the liquidation.

The directors must render to the liquidators an account of their transactions from the date of the last balance sheets accepted by the shareholders to the beginning of the dissolution ; the liquidators may accept or contest the same. If one or more directors become liquidators, this account must be published at the same time as the definitive inventory and balance sheet of the liquidators.

When the assets have been liquidated, the liquidators must prepare a final balance sheet indicating the dividend upon each share of stock. This with the syndic's report, is filed in the office of the commercial court and published ; within thirty days, the shareholders may file objections, which must also be pub-

lished. Two weeks thereafter, all of the objections are submitted to the court, which passes its decree upon them in one judgment; any shareholder may intervene and the judgment when pronounced operates *in rem*. If no objection is filed, the balance sheet is deemed approved, and the liquidators are discharged, except in respect of the distribution of assets.

The sums due to stock holders in liquidation and not reclaimed by them are deposited in court, and the books of account of the company are preserved for inspection of interested parties for a period of five years.

*Spain.*—The Spanish Commercial Code provides in a general way for the liquidation of corporations. During liquidation the corporate status continues to regulate the activities of the general meeting which has control over the progress of the liquidation and power to adopt such resolutions as may be necessary for the common interest.

*Switzerland.*—The Swiss Code of obligations relative to the dissolution of corporations follows the German Commercial Code with little modification. The commentators on the Swiss Code refer to the corporation as changing its juristic nature by entering into the period of dissolution, so that it no longer remains a corporation in the proper sense of the word, but becomes an association in liquidation in



which the several interests of the associates are proportioned to their shares.

The period of dissolution and liquidation is one which requires extraordinary protection for the interests of both creditor and stockholder. The protection to be afforded to the stockholder ought to be based upon two desiderata, somewhat conflicting, yet both of equal importance. On the one hand it is important that the corporation shall wind up its affairs as nearly in the regular course of business as possible, so as to realise the most of its assets. On the other hand the corporation should endeavour to discontinue operations at the earliest possible moment so as not to incur greater loss.

The knowledge of the diverse rules regarding dissolution adopted by the different European systems of law will help us in determining the position of Indian Law so far as dissolution of trading corporation, is concerned. The Indian Companies Act has laid down the causes that may lead to a dissolution. It will be observed on comparing the Indian Law with its European prototype that all systems agree in extending to the meeting of the corporators the right to decide upon a dissolution at any time. Before taking up this important question, it is, however, necessary to examine more fully the various conditions and consequences of dissolution in general.

In the ordinary business corporation where the rights of the public do not intervene it is within the power of the body corporate by a vote of the majority of share-holders, to discontinue the corporate business; but such action in itself would not effect a dissolution so as to prevent the corporation from being sued. A decree of dissolution from a court of competent jurisdiction is necessary for the purpose. If, however, a corporation is dissolved by the repeal of its charter pursuant to an unconditional power of repeal reserved to the state or if its term of existence has expired, no judicial decree is necessary to effect a dissolution.

A dissolution may be effected by a surrender of the franchises of a corporation. The older cases generally say that a corporation cannot validly surrender its franchises unless the state accepts them. Charters are in many respects compacts between the government and the corporators. As the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal act of the corporation and will be of no avail until accepted by the government. There must be the same agreement to dissolve that there was to form the

compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power and one which cannot be supposed to exist. It may be noted that the modes in which a surrender is to be made and as to what facts constitute a surrender have been a fruitful subject of discussion in many courts. In England in the case of corporations created by a royal charter the surrender is by deed to the king. In India where corporations are created in virtue of statutory powers the mode of surrender is determined by the statutes themselves and becomes available when occasions specified in the statutes arise. It will be seen later on in the lecture on trading corporations that the rules determining the conditions of dissolution in this country are more or less perfectly settled.

The consequences of a dissolution are both substantial and formal. The substantial consequences are "that the business is wound up and all the legal relations subsisting in respect of the corporate funds are liquidated. The formal consequences are that the corporation can no longer act as such either before the courts or in business transactions" (1). The corporation cannot on this principle institute

(1) Taylor—on Corporations, P. 417, *Dobson v. Simonton*, 86 N. C. 492.

a suit nor can it be made a defendant in a suit. All suits already brought by or against it are abated. Such considerations raise the question as to whether it is not possible for a corporation to be regarded as the one and the same corporation after a temporary discontinuation of its corporate activity. I have already remarked that a corporation may cease to exist either because it may die a natural death or it may be executed or it may commit suicide so to say. When the corporation surrenders its corporate franchises into the hands of the crown it dies by its own hand in a way. It was uncertain for a long time whether the surrender of corporate privileges by townsmen resulted in an extinction of the corporation for good. At last in *R. v. Grey* three of the Judges held that a corporation was not totally "extinguished" by a surrender of its charter; "it was still subsisting, and had a capacity to take, and it would be very inconvenient if it should be otherwise" (1). There is then some authority for saying that there might be instances where a corporation survives its bodily death. Although it sounds paradoxical to assert that something like the psychical phenomenon of survival of personality appears in a very concrete form in this practical branch of law yet such a statement has been made by jurists in ancient as well as in modern times.

(1) 8 Mod. Rep. Case 291.

Another phase of the same question is whether it is not possible for a corporation to survive the death of its members and to exist without any members at all. Blackstone and Grant are of opinion that a corporation can never exist without members. Roman Law and Canon Law insisted on a minimum of members. But Savigny and Windscheid (1) think that a corporation may survive the last of its members. Salmond appears to find some justification for the opinions of the German jurists in the rule establishing the existence of one man company in modern law. The shareholders may become so reduced in number that there is only one of them left, but he and the company will be distinct persons for all that(2). "May we not get further still and say that a company is capable of surviving the last of its members? At common law indeed a corporation is dissolved by the death of all its members. There is, however, no logical necessity for any such rule, and it does not apply to corporations sole, for beings of this sort lead a continuous life notwithstanding the intervals between the death or retirement of each occupant of the office and the appointment of his successor. Nor is there any reason to suppose that such a ground of dissolution is known to the trading corporations which are incorporated under the

(1) *Vide* Salmond, L. C. P., 348.

(2) *Salomon v. Solomon & Co., Flitcroft's case.* (See *ante*).

companies acts. Being established by statute they can be dissolved only in a manner provided by the statute to which they owe their origin. The representatives of a deceased shareholder are not themselves members of the company unless they become registered as such with their consent. If therefore on the death of the last surviving members of a private company, their executors refuse or neglect to be registered in their stead, the company will no longer have any members. Is it for that reason *ipso jure* dissolved? If not, it is clear that since a company is something entirely distinct from its members it can survive them and exist without them”(1). It may become necessary to decide this fundamental question regarding the survival of personality of a corporation in many cases. A fantastic instance may put the situation plainly before us. Following Mr. Carr one may suppose that the Chancellor, the Vice-Chancellor and all the fellows of an Indian University have assembled in the Senate House in connection with a University function. After the function is over they are all entertained at a dinner. By the negligence or caprice of a cook all the corporators thus assembled in full number are suddenly poisoned. Is the corporation, *viz.*, the University in question at an end? Or does it exist passively in spite of the death and the consequent temporary

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(1) Salmond-Jurisprudence, p. 348.

loss of all the corporators? In such circumstances, although extremely improbable, it would be natural to suppose that the corporation is not extinct but temporarily is in abeyance. In an old English Case it was decided that a corporation was not extinct when all the corporators were dead, *e.g.*, "the Abbey when all the Abbots and the Court are dead escheats as an Abbey to the founder" (1).

In modern times it has been expressly recognised in America that for some purposes it is necessary to prolong the existence of a corporation after the expiration of its charter, *e.g.*, for the purpose of winding up its affairs though not for the purpose of continuing its business. So in the *Mariner's Bank* case it was held that when a corporation was being wound up it depended on the statutory provisions whether under the circumstances any legal proceeding should be instituted in the corporate name or in the name of a receiver or of trustees appointed to wind up the corporate affairs. So the tendency is growing at present that makes for the recognition of the principle that the apparent dissolution of the corporate body does not necessarily mean a total extinction of personality forthwith. Again if it be regarded as established and I have already dwelt on the fact fully that the existence of the

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(1) Grant l. c. 304, Carr—on corporation. Ch. IV.

Marshall—Do. Dissolution.

corporation itself is independent of and separate from the existence of the individual corporators, it seems quite reasonable that the death of all the members should not affect the corporate existence any more than the death of some of the corporators.

Sometimes however it is possible for a corporation to perish by mere disintegration or decay *e. g.*, if there be a corporation consisting of two or more essential parts and if one of these be lost beyond recovery. Thus Grant observes that in the case of a corporation "having a head who by the constitution is to be annually elected on a certain fixed day by the corporators they neglect or omit to elect a head on the proper day, the corporation is virtually dead; for in the vacancy of the head such a corporation can do no corporate act and in such a situation" the corporation must be recreated<sup>(1)</sup>. A curious instance of this rule comes from the England of the latter half of the 19th century. In 1863, Dr. Whewell the master of Trinity College, Cambridge wishing to leave a sum of money to his own college thought it prudent to frame an elaborate trust providing that the fund should not actually vest in the college until the election of a new master. Modern statutory rules have rendered such precautions unnecessary; but the theory that led

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(1) Grant, L. C., p. 303.



Dr. Whewell to take the particular step mentioned regarding his bequest to a corporation still holds good in English Law.

While dealing with the generalities of dissolution of a corporate body one may ask the pertinent question what becomes of the assets of a limited company which is voluntarily wound up? If it be admitted that the dissolution does not forthwith determine the juristic capacity of a corporation, and we have seen that the modern view leans towards this supposition, it must be granted that corporation as such has still some hold on its assets. Thus in *Whiteby Exerciser, Ltd., v. Gamage* where an order was made dismissing an action with costs because the plaintiffs had failed to comply with a previous order that they should give security for the costs of the action, and where the taxing master supposed that the defendant ought not to be allowed the costs of his affidavits, on the ground that the latter should not have been prepared during the stay of proceedings allowed by the court it was held that the taxing master had acted on a wrong principle; the costs of the affidavits ought not to have been disallowed (1). Again the case of the *General Accident Assurance Corporation, Ltd.*, supports the view taken here. X assigned by way of mortgage to the General

(1) 1898 2 Ch. 405 (1904), 1 Ch. 147.

Accident Assurance Corporation, Ltd., a certain lease to secure the repayment with interest a certain sum of money. By a written agreement made subsequently it was agreed between the General Accident Assurance Corporation, Ltd., and the Scottish General Insurance Corporation, Ltd., that the former should take over the business of the latter. Afterwards the Scottish General Insurance Corporation, Ltd., went into liquidation. The question arose as to whether an order might be made under Ss. 26 and 35 of the Trustee Act, 1893 vesting in the purchasing company all the estate of the company that was going into liquidation. It was decided that when a limited liability company goes into voluntary liquidation and afterwards becomes automatically dissolved the court could make an order vesting the property of that company in the purchaser for all the estate at the date of its dissolution.

The question that we are discussing has not, in spite of the decisions quoted, been satisfactorily answered. At least that is the opinion of some of the English jurists; "when an ordinary person," says one of them, "shuffles off this mortal coil he leaves an executor or administrator behind him to represent his rights and liabilities; when a company, on the contrary, is wound up, it vanishes into thin air, and the person who is suing it finds himself in

as disconcerting a position as Menelaus when the Goddess of Love snatched Paris in a cloud from his avenging arm. This was the litigant's position in *Whiteby Exerciser Ltd. v. Gamage*. What, by the way, becomes of a company which is dissolved after some months of suspended animation under S. 143 of the Companies Act 1862? The answer involves perhaps some metaphysical nicety well fitted to exercise the subtlety of the schoolmen. Its soul cannot be extinct because the company can be recalled to earth and reinstated on the register of companies on petition under the Companies Act 1880. It must, presumably, be hovering *in nubibus* or latent *in gremio legis*. North J., however, without entangling himself in these cobwebs of the schools held that he had jurisdiction to make the order against the company, though defunct, in as much as it was *in esse* when the summons was taken out. A defendant company which winds up voluntarily *pendente lite* is not deserving of much sympathy, as it is evidently evading justice by a sort of *felo de se*. But in the meanwhile what of any assests? Are they *bonâ vacantia* belonging to the Crown or do they go to the Board of Trade under the Companies' liquidation account? (1). The queries so frequent in this passage seem to suggest that after liquidation the assets ought to be regarded as belonging to the dead

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(1) The Law Quarterly Review, Vol. 15, p. 6.

corporation. The dead hand must release the property it is grasping.

Recently the question regarding the outstanding assets of a company that has committed suicide by winding up its affairs voluntarily, was involved in Taylor's agreement Trusts when Mr. Justice Buckley decided that the legal estate in a patent for an invention vested in the crown. Taylor's case was further complicated with another difficulty *viz.* whether the crown could be a grantee from itself and if not where was the patent? The case shows clearly that the fundamental question remains still unsettled.

As regards commercial companies created under the English Act and the present Indian Companies Act it may be said that the position of these trading corporations after they have been effectively dissolved is free from much doubt. Shortly stated it is this—the claims of creditors must first be satisfied, and the remaining assets if any are to be divided among the shareholders, in proportion to the value of their interests. Debenture holders rank before unsecured creditors even when the debenture holders are themselves largely interested in the shares.

Here it may be instructive to institute a comparison between the methods of dissolution of corporate bodies and those of unincorporate societies. A general review of the rules

regarding the extinction of an unincorporate society will make it clear that a corporate group occupies a fundamentally distinct position in the juridical systems of the modern world. The dissolution of an unincorporate society is effected by the mutual consent of its members. The ordinary principles of contract law obtain in this case; consequently in the absence of any provision to the contrary the consent must be unanimous. If a minority oppose the dissolution and a majority insist upon it the only legal effect is that the latter have resigned their membership of the society and interest in its property. As an example a few passages may be quoted from the judgment of Lord Robertson in the famous Free Church Case. There the majority purported to dissolve the existing Free Church and to make over its property to a new body known as the united Free Church. Lord Robertson said "the church set up in 1843 was endowed by the liberality of its members, with the property in dispute. Two competitors now claim it. Of the respondents the first remark to be made goes to the very root of their claim. They are not either in name or composition the Free Church of Scotland. They are not even the majority of the Free Church, but the assignees of the majority of the Free Church: they are a body formed in 1900 by the fusion of the majority of the Free Church with another

body of presbyterian Dissenters, the United Presbyterian Church. The property of the Free Church is claimed by this composite body which, to the extent of a third or some large proportion is composed of United Presbyterians. Of this new body it may be affirmed nearly as truly that it is united Presbyterian as that it is Free Church. The change of name and the fact of fusion put it on the respondents to prove their identity with the original beneficiaries.

While such is the name and such the composition of the respondents' body, the position of the other competitor, the appellants, is very much simpler. They are those ministers and laity of the Free Church who did not concur in the union of 1900, but protested against it; they have done nothing but remain where they were, holding to the letter all the doctrines of the Free Church, adhering to it as an institute and continuing its existence according to the measure of their powers. They say that in the event which has happened they are the Free Church—they are bretheren having left them for this new Church—just as those bretheren might have left them for the Establishment or the Episcopalians. They have however been declared by the respondents no longer to be all their communion and their Manse and Churches have been formally claimed by the respondents for their own

exclusive use. For let it not be forgotten that the contention of the respondents necessarily involves that the majority is entitled not merely themselves to retain the property but also to introduce the united Presbyterians as beneficiaries and to oust the dissentient minority from the benefits of the foundation " (1).

Thus it appears from the statement quoted above that the legal effect of the dissolution of an unincorporate society, when the dissolution is forced by a majority, is that the dissentient minority is regarded as forming the association. This is a result totally different from the effect of dissolution, even forced, of a corporation. The reason for the variation is to be sought in the nature of an amorphous group, for the latter does not belong to the category of the group-person. The property of such a body is deemed to belong to all the existing members as joint tenants but co-ownership is not, as we have repeatedly seen, corporate ownership, hence the rule with regard to dissolution, that applies to corporate property, is necessarily of a different nature from the one applying to the property of an association.

Connected with the topic of voluntary dissolution is the topic of dissolution caused by a forfeiture of its charter when a corporation

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(1) Orr's Report of the Free Church Case, pp. 591-94.

has failed to perform conditions prescribed by the charter. The question as to whether a misuser or non-user of certain powers prescribed by the charter is by itself sufficient for dissolution has an important bearing on American law. There the state has often to decide the advisability or otherwise of a *quo warranto* proceeding in connection with an alleged misfeasance of which a corporation has been guilty. Although in Indian law the principle of *quo warranto* has not a direct application yet occasions arise when it becomes necessary for the court to decide whether there are sufficient grounds for passing a liquidation order on an application by an interested party. A recent instance is that of the Indian Specie Bank Ltd. where an order for liquidation if made in time would have saved at least *in some* measure the secured creditors of the bank. It may be of some interest then to indicate briefly the American Law as to dissolution through forfeiture caused by misuser or non-user of powers constituted by the charter of incorporation.

Mr. Justice Story said in a famous American case "a private corporation created by the legislature may lose its franchises by a misuser or a nonuser of them and they may be resumed by the Government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the Common Law of the land, and is a tacit condition



annexed to the creation of every such corporation " (1) Therefore it is plain that the mis-user or non user does not result *ipso facto* in a dissolution of the corporation. In fact as a general rule, however long a corporation may fail to exercise the powers conferred upon it or however much it may abuse them a forfeiture of its charter can only take effect upon a judgment of a competent tribunal in judicial proceedings instituted by the authority of the state. The state may waive the forfeiture and until it institutes proceedings to have forfeiture judicially determined and declared and a judgment or decree of forfeiture is rendered the existence of the corporation continues for all purposes, just as if there had been no mis-user or non-user and the forfeiture cannot be set up collaterally by private individuals or other corporations or even by the state, for the purpose of attacking the right of the corporation to exercise the powers and franchises conferred upon it by its charter. Thus it was held in *Heard v. Talbot* that a corporation created for the purpose of constructing and maintaining a canal and authorized by its charter to maintain a dam for the purpose of supplying its canal with water, did not forfeit its charter or lose the right to maintain the dam, merely because it had ceased to use the canal for

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(1) *Terrett v. Taylor*. *Rex v. Amery*. *Com. v. U. F., etc., Co. of Newbury port* quoted on p. 424 by Marshall on Corporations.

several years and had filled up portions of it, and suffered it to remain in such a condition as to be entirely unfit for use, where there had been no surrender of its charter and acceptance thereof by the state, nor any judgment of forfeiture in proper judicial proceedings; and that the abandonment of the canal as a cause of forfeiture could not be set up collaterally by a private individual for the purpose of attacking the right of the company to maintain the dam. (1)

The principle just now stated applies generally when a corporation fails to comply with conditions subsequent expressed in its charter even though a penalty of forfeiture might have been fixed by the charter for failure to comply with the conditions; for unless the charter provides that a failure to comply with the conditions subsequent shall *ipso facto* dissolve the corporation, mere nonfeasance will not operate as a cause for extinction of the corporation and consequently forfeiture of its charter of incorporation.

The grounds for forfeiture of charter have been thus summarized by a distinguished American writer:—When a corporation has been guilty of acts or omissions of duty which by its charter or some other statute are made a cause of forfeiture of its franchise to be a corporation and proceedings are instituted on

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(1) Marshall—*op. cit.*, p. 426.

behalf of the state to enforce the forfeiture the court has no discretion to refuse a judgment of forfeiture. But in other cases where a corporation has merely violated its charter by doing unauthorised acts, or where it has been guilty of neglect, the court is vested with a discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered or whether the corporation shall merely be ousted from the exercise of the powers illegally assumed or required to perform the duties neglected; and in determining this question it will consider both the interests and welfare of the public and the interests of stockholders and of creditors. As a general rule the charter of a corporation will not be forfeited for mis-user, or for non-user or neglect, unless it was wilful or fraudulent or at least due to culpable negligence or unless the legislature has expressly prescribed the penalty or forfeiture. And even when the abuse of its franchises by a corporation or its neglect of duty is wilful and fraudulent the court will not necessarily give a judgment of forfeiture. In the first place the abuse or neglect must be such as to affect the public. In the second place although the mis-user or non-user of its franchises by a corporation may have been wilful and fraudulent, the court may on a consideration of the interests of the stockholders as well as the public, oust the corporation from

the exercise of the powers illegally assumed, instead of ousting it from the franchise to be a corporation. To authorise a judgment of forfeiture the mis-user or non-user must affect matters which are of the essence of the contract between the corporation and the state (1).

We may now turn to the dissolution of corporations in Indian Law. You remember that it was observed at the beginning of this lecture that a comparative view of the law regarding dissolution was a useful guide to the proper comprehension of the Indian Law. A special feature of our law regarding the extinction of private corporations is that the conditions of dissolution are specifically marked out by the statute, *e.g.*, the Indian Companies Act 1882, has divided the subject of the winding up of companies and associations into two parts (a) compulsory or involuntary winding up (b) voluntary winding up. As to the circumstances that may lead to the winding up by court, the Act says that one or other of the following is sufficient, *viz.*, (1) whenever the company has passed a special resolution requiring the company to be wound up by the Court; (2) whenever the company does not commence its business within a year from its incorporation or suspends its business for the space of a whole year; (3) whenever the

(1) Marshall—*Op. cit.*, p. 429.

members are reduced in number to less than seven ; (4) whenever the company is unable to pay its debts ; (5) whenever for any other reason of a like nature the Court is of opinion that it is just and equitable that the company should be wound up. As to the voluntary winding up of a company the Act is likewise clear and the circumstances under which a voluntary winding up may take place are specified as follows:—A company may be wound up voluntarily (1) whenever the period, if any, fixed for the duration of the company by the articles of association, expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be dissolved, and the company in a general meeting has passed a resolution requiring the company to be wound up voluntarily ; (2) whenever the company has passed a special resolution requiring the company to be wound up voluntarily ; (3) whenever the company has passed an extraordinary resolution to the effect that it has been proved to its satisfaction that the company cannot by reason of its liabilities continue its business and that it is advisable to wind up the same.

Thus it is clear that there is a general agreement between the European law and the Indian law so far as dissolution of group bodies is concerned. All systems agree in

extending to the corporators the privilege of determining when and how the corporation is to become extinct. Of course the details perforce differ and it is difficult to say which system has afforded the greatest protection to the parties in interest, *e.g.*, the German and French law differ from the Indian law in insisting on a strong majority in the case of a dissolution by vote. But it is not always apparent how the fragmentary provisions of the French law may help, at least theoretically, the individual shareholder. The Indian law which aims at safeguarding the parties in interest has attained its aim through the very generality of its rules. This is made clear by the statement in the Act itself of the consequence of the winding up.

A parallelism is also noticeable between the rule regarding the continuation of the corporate state and the corporate powers, even after the commencement of the winding up, as it obtains in this country and the rule in European law as already noticed before.

Generally speaking it may be remarked that the doubts and difficulties connected with the question of dissolution are of the same nature as those in English law. The reason being that the Indian law is but a copy of the English one. Hence questions that have not yet been finally answered by the English decisions remain still unsolved

in India. It will take us far from the direct route that we are following if we try to be engaged in noticing even some of the prominent problems that await solution. I have already drawn your attention to one of these *viz.* the question as to the fate of the corporate assets after dissolution has started. Various jurists have given diverse answers to that question. When experts disagree it behoves an amateur to maintain discrete silence. All that one may do in a general course of lectures is to indicate the broad paths without entering by lanes specially when pitfalls are so many.

One fact is to be always borne in mind however, that the general rule about dissolution is narrowly connected with the idea of personality of a group person. The very doubt that some jurists have suggested as to the existence of a corporation after the disappearance of all the corporators shows that even minds specially trained to observe juridical phenomena cannot always avoid the error into which the unwary is frequently liable to fall. But if the fundamental formula of legal personality is clearly understood the chances of making a gross mistake would be surely minimised. The corporation is not co-extensive with the sum of the corporators. There is consequently nothing extraordinary in the statement that in some cases the legal personality survives the disappearance of the

individuals who are the organs of co-ordination. The Indian Companies Act specifically recognizes this principle by saying in S. 175 that even after the commencement of the winding up of a company "its corporate state and all its corporate powers shall continue" for some purposes. The body is dissolved but the person remains.

That peculiar kind of corporation called the corporation sole will make some points, passed over in this lecture, fully clear. The question of dissociation of legal personality has at least in the case of a corporation sole been freed from artificial complications.

I proceed to take up the corporation sole.

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## NOTES ON LECTURE VI.

1. For a detailed account of the position of creditors and shareholders the monograph of Dr. Kuhn (A comparative study of the Law of Corporations) is useful. A condensed account has been given in the lecture the substance, as already indicated, has been taken from this monograph, pp. 80-84.

2. Although not directly connected with the topic discussed in Lecture VI, the Speech of Mr. Haldane (now Viscount Haldane) in the Scotch Church case is very illuminating. It shows the kernel of the theory bearing on the personality and dissolution of the personality of a corporation. The practical import of the theory was put forth in the following terms:—

“The Church is like an organism..... It is not A, B and C coming together and entering into a contract with each other which is to bind them and their estates; on the contrary, it is the formation, of an organisation which is to remain.”.....

The whole case turns on the inherent life of a corporation.

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## LECTURE VII.

### Corporation Sole.

The corporations that have kept us busy till now consist of an aggregate of many. The outstanding characteristics of the aggregate figuring as a group person are, as you have noticed no doubt, permanence and succession. When it appeared that certain individuals presented a double capacity thereby splitting their individuality into two parts as it were, of which one part functioned as an ordinary individual and another shared in the important incidents of corporateness, these came to occupy a class by themselves. A single individual having legal personality distinguished from his natural character led Coke to remark that persons "incorporate or politique are of two sorts, viz., either sole or aggregate many."

A corporation sole then consists of one member only. In form it is essentially different from a corporation aggregate. The fact that all except one member of a corporation aggregate have ceased to exist does not convert that corporation aggregate into a corporation sole. In a famous American case, (1) all the shares in a corporation aggregate became vested by transfer in a single individual, but

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(1) *Russell v. Machellan*; 14 Pick (Mass).

that individual did not thereby become a corporation sole. The original shares were regarded as still distinct and might at any time be redistributed by the single holder. The sole body politic must start therefore as sole *ab initio*.

The corporation sole is an entity of much trouble to the systematist who would look for symmetry and smoothness in legal classification. It was unknown to the Romans, their maxim as you recollect, was *tres faciunt collegia* that is to say the Roman idea of a corporation was bound up with the notion of plurality. But modern systems have had to receive this new comer as a means of securing the continuity of an institution. A man's official capacity is separated from his natural capacity to be made into a new *persona*. The English law is said to be responsible for this new type of corporations. Prof. Freund remarks : " the common law knows a species of corporations called corporations sole, consisting of only one person for the time being, king, bishop and parson are the most conspicuous examples of this class. It is true that there is here a succession of several persons constituting the body corporate, but we cannot speak of an association and consequently we do not find the peculiar conditions which the associated holding of rights creates. In the case of the corporation sole it obviously cannot

be the difficulty of concurrent action which demands an anomalous treatment, there is no necessity for original or delegated representation. The difference from an individual beneficial right lies here in the unity of title between the successive holders, so that property devolves from one to the other without formalities of transfer, *inter vivos* or *mortis causa*. In other words there is an objective determination of the inherence of the right ; each successive holder appears merely as the representative of an interest more enduring than the term of his holding. Just as we regard each member of a corporation aggregate not in his individual capacity, but merely as one of a number of associates, so in the corporation sole the individual is regarded in the abstract character of the temporary holder of a perpetual interest. Conceivably the same idea might have been extended to a succession of sole trustees or to a succession of individual officers holding title in their official name as was actually done in the case of the chamberlain of the city of London.”

(1) The idea of a corporation sole has no doubt been acceptable as that of the corporation aggregate because it is called for by a practical necessity. It is met with in Indian law and it may be remarked that in this particular Indian law is not directly indebted to

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(1) Kyd, on Corporations Kol. I., P. 20. Freund, L. C., p. 36.

any European system. The indigenous law was familiar with juridical persons like the idols or in some cases the managers (1) of religious endowments long before it was influenced by English jurisprudence. I shall begin by touching briefly on the history of the corporation sole in English law just to show how similar needs in totally dissimilar societies have been met with similar juridical devices. Prof. Maitland has made a thorough study of the question and it may be safely said that no greater authority can be quoted against this great historian of the English law. I shall follow his lead in this topic.

Historically speaking the doctrine of the corporation sole centres round the king and crown. In the 16th century the English lawyers used mystical language of the king. "At times they will seem bent on elaborating a creed of royalty which shall take no shame if set beside the Athanasian symbol. The king has a body corporate in a body natural and a body natural in a body corporate." Some of the phrases may be due, as Pollock and Maitland suggest, to the desire to stand well with the reigning prince, while the subtle distinctions of which the early writers seem to be very fond may be due to that lack of mystery which is natural to all men. But it must be

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(1) For a different view see G. C. Shastri's Hindu Law.

allowed, however, that there were real difficulties to be solved. And the solution of those difficulties led perhaps to the personification of the kingly office "in the guise of a corporation sole." The lawyerly doctrine served at the same time to flatter the vanity of the kings as well as to express those limits which had gradually been set to the king's power in order to harmonize the ancient law with modern requirements (1).

The medieval king was "every inch a king, but just for this reason he was every inch a man and you did not talk nonsense about him. You did not ascribe to him immortality or ubiquity or such powers as no mortal can wield. If you said that he was Christ's vicar, you meant what you said and you might add that he would become the servant of the devil if he declined towards tyranny. And there was little cause for ascribing to him more than one capacity. Now and then it was necessary to distinguish between lands that he held in right of his crown and lands which had come to him in right of an escheated barony or vacant bishopric. But in the main all the lands were his lands" (2). In short the medieval lawyers were not troubled with any metaphysical question regarding the double personality of the king. In the year Books, whatever is

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(1) Pollock and Maitland-History of English Law, Vol. I, p. 512.

(2) Pollock and Maitland *loc. cit.*, p. 216.

said as to the personality of the king, applies literally to a Henry or an Edward. Again the contrast between state and corporation was hardly visible in the middle ages. The nation was then pictured as a community which formed a body of which the king was the head. The portrait that Henry VIII painted of the body politic of which he was the head thus appeared in 25 Henry VIII C. 12. "Where by diverse sundry old authentic histories and chronicles it is manifestly declared and expressed that this realm of England is an empire and so hath been accepted in the world governed by one supreme Head and King, having the dignity and royal estate of the Imperial crown of the same, unto whom a body politick, compact of all sorts and degrees of people and by names of spirituality and temporalty being bounden and owen to bear, next to God a natural and humble obedience" (1). Here is undoubted evidence of an intermixture of old thoughts and new. As Maitland points out "the body spiritual is henceforth to be conceived as part of the said body politic which culminates in King Henry. The medieval dualism of church and state is at length transcended by the majestic lord who broke the bonds of Rome. The frontispies of the *Leviathan* is already before our eyes. But as for Hobbs, so also for King Henry, the personality

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(1) *Idem*,

of the corporate body is concentrated in and absorbed by the personality of its monarchical head. His reign was not the time when the king's lands could be served from the nation's lands, the king's wealth from the common wealth or even the king's power from the power of the state. The idea of a corporation sole which was being prepared in the ecclesiastical sphere might do good service here. Were not all Englistmen incorporated in King Henry? Were not his acts and deeds the acts and deeds of that body politic which was both realm and church?" (1)

Some disputation arose in connection with the alienation of property by an infant king. In fact many difficulties were connected with the nature of royal personality. Land had been conveyed to Henry VII and the heirs male of his body lawfully begotten. What was the effect of such a limitation? Could the head of a body politic beget heirs. Maitland remarks (2) "in Plowden's reports we may find much curious argumentation about the kings to bodies, and I do not know where to look in the whole series of our law books for so marvellous a display of metaphysical—or we might say metaphysiological—nonsense."

The theory of corporation sole had, however, to pass an uneasy time. To bring the

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(1) Maitland—Collected papers Vol. III, p. 246.

(2) Maitland—The Crown as corporation L. Q. R., April 1901.



“Artificial” King into line with a group body proved a difficult task. The difficulty was due to internal as well as to external causes. Internally the theory was logically imperfect, e.g., in Calvin’s case one was taught that “the King is two persons, but though he has two bodies and two capacities he hath, but one person.” Such a contradictory statement could but produce detestable consequences. The external difficulty that the infant theory met with came from the attempt to justify the older law by the newer doctrine. Thus the theory of the two Kings or two persons stubbornly refused to do any real work in the cause of jurisprudence.

Maitland seems to think that the crown has been given a juridical personality by the text-writers although such a personality was not either formally or explicitly recognized in the English law. One of the legal subterfuges has been that of making the king a trustee for unincorporated groups, another to substitute the crown for king or queen. “I believe that an habitual and perfectly unambiguous personification of the crown is much more modern than most people would believe. The suggestion that the crown is very often a suppressed or partially recognised corporation aggregate is forced upon us so soon as we begin to attend

with care to the language which is used by judges when they are freely reasoning about modern matters and are not feeling the pressure of old theories."

The term corporation sole may be said, in a way, to be due to Sir Richard Broke who died in 1558. Although Broke never used this exact phrase, but more than once he called a parson a corporation. In a case of Henry VI's reign an action for an annuity was maintained against a parson on the ground that he and all his predecessors had paid it. The idea of a corporation was present here although the actual term was not used. Broke by applying the term corporation to a parson suggested that a very large number of corporations sole existed in England and thus prepared the way for Coke's famous classification of legal persons. "Apparently for some little time past lawyers had occasionally spoken of the Chantry priest as a corporation. So early as 1448 a writ is brought in the name of John Chaplain of the Chantry of B. Mary of Dale; objection is taken to the omission of his surname and to this it is replied that the name in which he sues may be that by which he is corporate. Then it would appear that in 1482, Bryan, C. J., and Choke, J., supposed the existence of a corporation in a case in which an endowment was created for a single Chantry Priest. Five years later some sergeants were condemning as void

just such licenses as those which Bryan and Catesby had discussed and thereby were proposing to provide the lately crowned Henry VII with a rich crop of forfeitures. Keble opines that such a license cannot create a corporation.

The difficulty that the expression corporation sole had in finding a place in English jurisprudence is well illustrated by the fact that even in 1522, the year subsequent to Broke's graduation at Oxford, Fineux was declaring that a corporation sole would be an absurdity, a non-entity. He said "it is argued that the master and his brethern can not make a gift to the master, since he is the head of the corporation. Therefore let us see what a corporation is and what kinds of corporations there are. A Corporation is an aggregation of head and body: not a head by itself not a body by itself; and it must be consonant to reason, for otherwise it is worth nought. For albeit the king desires to make a corporation of J. S., that is not good, for common reason tells us that it is not a permanent thing and cannot have successors." This shows that in 1522 at least the term corporation sole was not in common use. Maitland thinks that the term would never have made its fortune had it not been applied to a class wider than that of permanently endowed Chantry priests.(1) And it must be added that the term was not introduced before the days of

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(1) Maitland; *loc cit.*, p. 218.

Richard Broke although many occasions arose that called for some such term. It might have been used in connection with the controversies "over the glebe, over the parson's freehold, the parson's fee, the parson's power of burdening his church or his successors with pensions or annuities." But it was not. So the credit for the invention is due to the author of the Grand Abridgment.

As to the legal phenomenon as opposed to the legal phrase one must remark that the ecclesiastical sphere was the one where corporations sole had their full activity. There are a few instances of corporations sole which are not of ecclesiastical origin. Thus Coke instances the Chamberlain of the City of London as a corporation sole. The King again is evidently outside the Church. But the centre of sole corporateness, as Maitland has it, obviously lies among ecclesiastical institutions. "If there are any, there are thousands of corporations sole within the province of church property law" (1) To follow the development of the English Law in this particular will mean a thorough study of a part of ecclesiastical history. Prof. Maitland has dwelt on the topic in a long essay on the corporation sole. It is no use going into the details as they have been fully treated in the essay mentioned. All that is necessary for us to know is that the corporation

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(1) Maitland—*loc. cit.* p. 219.

sole grew out of the necessities of the church, just as in Hindu Law the religious establishments have been responsible for the original idea of juristic persons obtaining in connection with the idols and *maths*.

So much for the history of this entity called the corporation sole. I pass on to the concrete cases that illustrate the validity of the theory of juristic personality. The most important corporation sole is, as already noticed, the King. Now the peculiarity of a corporation sole is that it has two capacities—one natural, the other political. The rule regarding the vesting of lands in the crown or that of succession to the office takes into account the dual capacity of the crown as a corporation sole. When land is given to the King and his heirs, the “heirs” means successors. The King as a natural person must be distinguished from the King as a political person. The heirs of a natural person are determined by the common private law, while the heirs of a political person are determined by the public law and in our case by the constitutional law. Thus if the King die without issue male, but leaving two daughters, the lands held to him and his heirs shall go to the eldest daughter, because she succeeds to the crown, though in the case of common persons the lands would have devolved upon both the daughters who would have taken as co-parceners. So if the reigning

dynasty were changed and another family were placed upon the throne, lands given to the dethroned monarch before his expulsion and held to him and his heirs, would go at common law to the successor and descend in the new line of succession as before. (1)

There are certain limitations on the juristic power of the King for although the incorporation does not deprive him of all the rights and duties of a natural person, yet some juristic acts are to be performed in a way calculated to promote the object for which the office has been created. Thus the King cannot divest an interest, but by deed though he may give a license that has not the effect of divesting an interest. (2) The King cannot be a copyholder in any capacity. Again all inheritances and chattels real when granted by the King must be under the great seal. The chattels pure and simple may, however, be disposed of under the privy seal.

A bishop is an example of an ecclesiastical corporation sole. A bishop may hold lands for his diocese, but he holds in virtue of his office and not as a natural person. Like the King the juristic power of the bishop is limited in several ways, *e.g.*, the powers of enjoyment, the rights of control and the powers of alienation are regulated by definite rules. In

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(1) 2 Howell State Trials p. 598. Grant, *loc cit.*, p. 627.

(2) Reynel's Case, 9 Rep. 99 a

Mulliner v. M. R. Co., Jessel M. R. remarked "as regards the ecclesiastical corporation sole it was long since decided as to rectors, vicars, &c., that, though in a certain sense owners in fee simple, yet in many respects they have only the powers of tenants for life. Of course no owner in fee simple can actually enjoy beyond his life, and therefore in that sense they were no worse off and no better off than others who are owners in fee simple. But it was said that being seized in right of their churches, they had not the ordinary powers of the proprietors in fee simple, and such powers as opening mines and so on were denied to them, and they were not allowed to use their property in the same way as ordinary owners of land." (1)

The fee simple of episcopal lands is not in the bishop and his heirs, but in the bishop and his successors. If the bishop dies the freehold of the lands which he holds as private and natural man vests immediately in his heir, but the lands he holds in his official capacity as a bishop go to his successor. In order, therefore, that freehold might not be in abeyance the rule was early invented that a bishop "is regarded as bearing the persona of his predecessors." The continuous official personality was created to meet the demands of a very old rule of law.

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(1) 11 Ch. D., P. 623.

The parson is a common law corporation sole. Coke says "in the legal signification the term is taken for the rector of a church parochial and the parson is called the *persona ecclesiac*, because he assumeth and taketh upon him the person of the church and is said to be seized in *jure ecclesiac*, and the law had an excellent end therein, viz., that in his person the church might sue for and defend her right, and also be sued by any that had an elder and better right." (1)

It should be remarked as Maitland has observed that whether the church was seized of the church lands with the parson for its guardian or whether the parson and his successors were seized in *jure ecclesiac*, the parson was regarded as having two capacities, viz., (1) the capacity of a natural physical man, (2) that of an artificial official person capable of being construed by law as a corporation sole. The corporation sole was fashioned in order to explain the parson's relation to the glebe. (2)

There are some instances of corporations sole created by Statute in English Law e.g., clerks of the peace during the reign of Elizabeth were regarded as corporations sole; again 3 and 4 Vict. C. 96, Ss. 67 says "to enable the Post Master-General for the time being to hold and to take conveyances and leases of messuages, tenements lands and hereditaments for the

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(1) Co. litt. 300 b. See also Carr. *loc cit*, p. 21.

(2) L. Q. R., April 1901, p. 131. Essay by Maitland.



service of the Post Office and to transmit the same to his successors it is enacted that for such purpose Her Majesty's Post Master General and his successors shall be and is and are hereby made a body corporate, and shall have a seal ; and that all messuages, tenements, lands and heriditaments, of whatsoever nature and tenure, now vested in Her Majesty's Post Master-General, his heirs, executors, administrators and assigns in trust for Her Majesty and Her Successors, shall immediately on the passing of this Act be and become invested in him in his corporate capacity and his successors for ever in trust as aforesaid." By 16 and 17 Vict. C. 137, S. 47, the treasurer of public charities was made a corporation sole. In subsequent years the Principal Secretary of State for war and the Solicitor for the affairs of Her Majesty's Treasury were made officially corporate. These statutory corporations sole are generally the official heads of Government Departments. They bear the official names and have perpetual succession by those names with a capacity to acquire and hold lands, to sue and be sued, to execute deeds, using an official seal, to make leases, to enter into engagements binding on themselves and their successors in office and to do all acts necessary or expedient to be done in the execution of their official duties. (1)

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(1) 18 & 19 Vict. C. 117, § 2.

Here some remarks may be made as to the selection of persons who are turned into corporations sole. Prof. Maitland regards the genus as an unhappy freak of English Law. The arbitrariness of the selection of individuals to fill up the category known as that of the sole body politic is emphasised in Sir William Markby's remarks that "the Queen is said to be a corporation sole and so is a parson. But the Secretary of State for India is not so, nor is an executor; though there is at least as good reason why both these persons should be treated as corporations sole as a parson." (1) Of course some explanation of the unequal treatment that different office-bearers have received at the hands of the English Law is found in historical necessity. But the fact remains that there is an extreme anomaly, so far as statutory corporations sole are concerned, in the selection made to constitute corporate persons. If it is supposed (and this supposition has been accepted almost universally) that the great value of the corporation sole is in the conception that it provides a juristic person capable of carrying on the rights and duties of an office whenever that office is temporarily vacant, there is no reason why the same corporation should not be at work when the same purposes are fulfilled by the same means. But one meets with disappointment in trying to

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(1) Elements of Law by Markby, § 145.

find out whether this principle has been logically applied by the English Law. The Post Master-General is a corporation sole while the Secretary of State for India is not so although they both are created to supply similar legal needs; it is difficult to find out any satisfactory explanation of such an arbitrary selection.

Let us now turn to the Indian Law in order to study the specific nature of our corporations sole. The law of religious endowments furnishes certain examples which may with some reservation in a few particulars be taken as types of corporation sole which have developed independently of foreign influence. The best way to study is to start with the legal nature of idols in Hindu Law. In order to understand the controversy that has recently been settled by a full bench decision of the Calcutta High Court, (1) it is necessary to go to some of the sources of the Hindu Law. It has been settled that the juridical person in the case of Hindu idol is not the material image, but the invisible spirit enshrined in the image. In fact the texts regarding the making and consecration of the images more or less clearly point out that it is not the image considered materially that is the object of worship, but it is the divinity that the image after consecration represents. Thus it is immaterial how an

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(1) Bhupati v. Ramlal, 14 W. N., p. 18.

image is constructed, but it is material how it is consecrated, e.g., the Matsyapurāṇa says "an image should be made of precious stone or of crystal or of earth or of auspicious wood or of what is agreeable to one's mind." (1) Again the Barahapurāṇa says "some persons worship my image painted in a wall and some in canvas and some worship me as embodied in the sphere of stone called *Salagram* sprung from a part of my nighit." (1) These texts show that the material used in the construction of an idol is not an essential factor for determining the religious and in this case the legal character as well of the image. But the consecration of an image occupies an important place in the Hindu theory regarding the nature of an idol.

The entire process of the installation of artificial images is known amongst the Hindus as *Deba Pratistha*. According to the *Bhagavata Purāṇa* the *Pratistha* is the means whereby the universal soul is localized and made to be at a particular place. The process of vivification (the *Pran Pratistha*) which results from the consecration of an image is the means whereby the idol is turned into a juridical person. The old texts as well as comparatively recent decisions seem to establish the doctrine that in Hindu Law it is not the material idol, but it is the deity enshrined in the image that is

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(1) Texts quoted in Shastri's Hindu Law, p. 470.

regarded as a legal person. The well-known case of *Thackersey Devaraj v. Hurbhum Nursey, &c.*, may be cited in illustration of the Hindu theory of a religious corporation sole. This was a suit brought by the plaintiffs who were six in number against the defendants as trustees of a temple at Mandir. Among other things it was necessary to decide whether the trust fund was public or private. The answer to this question was according to the Court to be determined by reference to the legal character of a Hindu deity. It was observed that the modern authorities fully confirm the more ancient writers and hold that property once solemnly devoted to the service of an idol cannot be alienated save in the interest of the idol. "In short the deity of the temple is considered in Hindu Law as sacred entity or ideal personality possessing proprietary rights. The managers hold these rights as trustees and the money once entered in the temple books is dedicated to the gods and becomes *res sacra*." (1) Another famous case decided by the Bombay High Court known as the *Dakor Temple* case is so instructive that I must fully state the case and the substantial parts of the judgment thereon as establishing the corporate character of the Hindu deity represented by an idol. "The case arose in connection with a temple situated at Dakor dedicated to the God

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(1) I. L. R. 8 Bom., P. 456.

Shri Ramchod Raiji. It was proved that the deity in question was held in great veneration by the followers of Vaishnab religion throughout Western India and that the offerings made by the votaries at this shrine amounted each year to about a lac of rupees in value. The existence of the deity could be traced back seven centuries and the reigning chiefs had from time to time added lands and villages to the property of the endowment. The throne of the deity had lately been covered with gold and silver by his Highness the Gaekwar at a cost of one lac and twenty five thousand rupees and the present temple had been built by the ancestor of one of the plaintiffs at a cost of one lac of rupees. The suit was instituted by the hereditary manager of the temple, descendant of the builder of the present temple and by four other plaintiffs who were priests residing in the same locality, whose duty it was to conduct the pilgrims who were their patrons, to the shrine and perform the worship of the deity on their behalf. The defendants were a numerous body of *sebaks* succeeding to their offices by hereditary descent; they remain in constant attendance on the idol, perform the daily services, and kept in their custody all the cash, ornaments, clothes and other offerings dedicated to the deity. They were paid Rs. 150 a year out of the revenues of the foundation. From

the time of the erection of the present temple the management of the temple and its appendant villages had been carried on by the family of the plaintiff, and at the sametime the *sebaks* had given an agreement in writing to the manager of the institution, by which the *sebaks* bound themselves to observe certain rules in the performance of the daily services at the temple and for the preservation of the offerings made to the idol." (1) The plaintiffs asked among other things that the defendants might be removed from their office of *sebaks* or worshippers and new *sebaks* be appointed in their stead because the defendants had frequently acted in contravention of the agreement already mentioned and had set up a proprietary title to the offerings made at the shrine and refused to render an account of the property held in trust for the idol. The Court said the defendants take the position that they as a body are the owners for all secular purposes, of the idol, whom in spiritual sense they serve. The offerings made at the shrine, the cattle and even the land presented by devotees are, they assert, their property free from any secular obligation, as none has ever in practice or in the intention of the donors been annexed to the gifts by which religious merit was sought and gained. They held the property thus acquired as a sort of sacred guild with

(1) I. L. R., 10 Bom., p. 248.

hereditary succession to the several members. It is not held on any trust for the support of ceremonies or with any obligation annexed to it that can be enforced in a secular Court. The duty of providing a regular worship for the deity is of a purely moral kind. Now the questions for decision are (1) whether the Court in its civil capacity has jurisdiction in matters of this kind ; (2) whether the defendants can take the revenue coming from the endowment absolutely as their own without any trust or annexed duty ; (3) whether they enjoy the revenue by a kind of agency or representation of the idol conceived as a personality " (1).

The points (1) & (2) noticed in the preceding paragraph do not concern us directly. But the third question at issue is important because it has reference to the juridical nature of the idol. With regard to this point the Court observed " the Hindu Law like the Roman Law and those derived from it recognises not only corporate bodies with rights of property vested in the corporation apart from its individual members, but also the juridical persons and subjects called foundations. Side by side with an ecclesiastical corporation there were charitable institutions in the Roman Law. In the Hindu Law the juridical persons have taken the forms not only of charitable institutions, but also the ideal forms symbolized by the

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(1) I. L. R., *loc cit.*, p. 250.



images. In the present case it appears from the evidence that the grants made to the temple are consistent with the theory of a juridical person like the deity personified in the idol at Dakor taking the grants. It is not consistent with the juridical person being conceived as a mere slave or property of the *sebaks*. It is indeed a strange if not wilful confusion of thought by which the defendants set up the Sri Ranchod Raiji as a deity for the purpose of inviting gifts and vouchsafing blessings, but as a mere block of stone, their property, for the purpose of their appropriating every gift laid at its feet. But if there is a juridical person, the ideal embodiment of a pious or benevolent idea as the centre of foundation, this artificial subject of rights is as capable of taking offerings of cash and jewels as of land" (1).

It is perfectly clear then that the Hindu Law recognises corporations sole especially as centres of religious endowments. The Dakor temple case, as you no doubt observe, discusses the juridical nature of a Hindu deity in connection with the legal character of a religious institution like the temple. The fact to be always borne in mind is that there is a parallelism between the method of evolution of a religious corporation sole in the European Law and that in the Indian system. Like the English Church the Indian Temple is regarded in law

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(1) I. L. R., *loc cit.*, p. 252.

as the centre to which the juridical activity of the deity is directed. The law which protects the temple against external violence guards it also against internal mal-administration. The latter purpose is well served through the recognition of the juridical existence of a consecrated image as a distinct entity. It must at the same time be kept in view that it is the deity represented by the idol and not the idol itself that figures as a corporation sole. Thus the Sankalpa or "formula of resolve" makes the deity himself the recipient of the gift which has to be made by the donor in an appropriate form. The ceremony of gift (*dana*) vests in the deity the property given by the donor.

The idol as a juridical person always means the consecrated image representing the deity. The juridical person is so much differentiated from its material representative that it is agreed "when an idol has once been consecrated by the appropriate ceremony performed and mantra pronounced the deity of which the idol is the visible image, resides in it and not any substantial image, and the idol so spiritualized becomes what has been termed a juridical person (1). The subject of rights is the deity—the immaterial person symbolized by the idol.

The next question is the important one recently settled by the Calcutta Full Bench,

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(1) Durga Prosad Dass v. Sheo Prosad Panda, 7 C. L. R. p. 278.

viz., is the Hindu deity a juridical person for all purposes? The question arose in connection with a will where the testator had directed certain properties to be placed in the hands of persons named by him and subject to certain payments, these persons were directed to spend the surplus income which might be left in the *sheba* and *puja* of Kali after establishing an image of the goddess. The Court had to decide whether the gift contemplated in the testament was a valid one. Mookerjee, J., observed "we must not assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities as an ordinary sentient being, and we must closely examine the scope of the passage in the Dayabhaga which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being. The passage in the Dayabhaga which is supposed to go to the root of the matter is translated by Colebrooke thus—that is actually seen in the world, since in the case of donation the donee's right to the thing arises from the act of the giver, viz., from his relinquishment in favour of the donee who is a sentient person. In the very next passage Jimutavahana proceeds as follows :—Gift consists in the effect of raising another's property

and that effect here depends upon the donee. On the first of these passages Rambhadra comments as follows:—It is said hereby that the definition of gift is abandonment characterized by the result of ownership. Sreenath comments on this as follows:—As ownership does not arise from every act of abandonment like the offering of a bull, &c., the author adds “intended for some conscious being.” The intention must have for its object the ownership of another, and this object is the object of the desire of abandonment. On the second passage Rambhadra comments as follows:—Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another, as from the taking of the property of the gods. The passage of Manu “those who steal the property of the gods or the property of the brahmans, &c.” refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahmin’s property becomes superfluous. Thus there being no other way to avoid this inconsistency the terms property and stealing must be taken in a figurative or secondary sense.”

Mookerjee, J., continues “It is clear from these passages as well as from other passages from Sreenath, Achyutananda and other commendators on the Dayabaga that they understood the rule about the acceptance of a

gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact as Sreenath points out an abandonment, in favour of the deity is not comprehended within the term gift. It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject matter has been accepted, the property is in a peculiar position, so that when the term property is used in relation to what has been dedicated to the deity, it has a secondary sense from what it bears when used in relation to persons."

After quoting several other authorities to show that the gods have no ownership of their own and consequently the primary sense of property is inadmissible in the phrase god's property the same judge remarks that in the case of deities there cannot be any acceptance and therefore any gift. If then property is dedicated to the deity in whom does the ownership lie? "The answer is that the King is the custodian of all such property. This is sufficiently indicated by some of the texts in the Mitakshara. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King as the ultimate protector

of the state, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication religious merit and spiritual benefit accrue to the founder and material benefit accrues to the persons in charge of the worship and to the creatures of God." It was decided on these grounds that the dedication of property could be validly made by a will to a deity the image of which was not in existence at the time of the death of the testator. The view that a Hindu deity is for all purposes a juridical person appears to be one requiring modification.

A Hindu deity as a corporation sole must therefore be distinguished from other corporations sole by the fact that it is a juridical person with limited legal capacity thus, as the elaborate judgment of one of the judges in *Bhupatinath v. Ramlal* shows, it is only in an ideal sense that property can be said to belong to an idol; for the simple reason that the possession and management of property in such a case must be left to some person as Shebait or Manager. The deity as a juridical person serves the purpose of filling up a gap in the Hindu theory of juristic persons.

Now I may turn to another class of corporations sole in Hindu Law. They are the managers of religious endowments. Although there is a difference of opinion with regard to the position of a manager. Is he a trustee or

is he a corporation sole? Some writers would think that the manager is a mere trustee. (1) But he was regarded by the Privy Council in *Raja Varma Valia v. Ravi Varma Mutha* as a corporation. The Privy Council view seems to be the more reasonable because the manager cannot be regarded as a mere trustee only on account of his liability in certain cases. The difficulty that has been raised against supposing the manager to be a corporation sole is associated with the succession to the office of shebait. The office may vest in a single person or in a number of persons. The rule of law is that in cases of religious endowments and in all cases of a known founder the latter has the right to nominate a shebait and to direct the mode of succession to the office. He may nominate himself as a shebait or he may reserve the right of nominating a shebait in himself and his heirs. From this it has been concluded by several authorities that the managers of religious endowments are in the position of trustees and they cannot properly be called corporations sole. But such a conclusion is not warranted either by the decisions of the Privy Councils or by the general theory of corporation sole. It has already been noticed that the peculiarity of a corporation sole is that a single individual presents a double legal aspect. Whenever an individual

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(1) C. Shastri—Hindu Law, p. 488.

has rights and duties other than those he has in a private capacity and he has the added rights and duties because he holds an office, the individual may be taken as a corporation sole. True in English Law there has been considerable anomaly in the choice of persons to be called corporations sole yet whenever the choice has been made the determining factor has been the dual capacity of a single individual. From this view of a corporation sole a manager of religious endowment ought to be properly classed as a special type of juridical person. At least the manager may be called a *quasi* corporation.

The opponents of the view adopted here say that in regarding the manager as a corporation sole a false analogy with the office of the English Bishop has been suggested. They say in addition that the whole estate is vested in the Bishop under the common law while in the case of the manager the property is in the deity. But the recent Calcutta Full Bench Judgment conclusively shows that the deity is an ideal and not a real owner. So the force of the argument that the head of Math or the manager of a religious endowment is a corporation sole by a false analogy, is at present almost nil.

The head of a Math may be taken as a good example of a juridical person. Although there is good ground for supposing that the



Acharya is not a counterpart of the bishop yet the conception regarding the juridical nature of the one is more or less applicable to the other. In *Vidyapuram Tirtha Swamy v. Vidhyanidhi Tirtha Swamy* (1) it was held that in the case of a Math the ideal person is the office of the Acharya. It may be that the corpus of the property is absolutely inalienable, but the restriction in itself is immaterial so far as the legal nature of the Acharya is concerned. The variation of legal capacity depends on questions of public policy, therefore if it is more expedient that the corpus of the property should not be alienated by the incumbent for the time being the state will necessarily limit the power of the incumbent so as to make it impossible for him to affect the property of the Math by any charge. So again the rules for the selection of the heads may vary in different circumstances. These variations are the accidental and not the essential characteristics of a juristic person.

The Mahamedan Law also furnishes examples of corporations sole. These like their Hindu prototypes are connected with the religious endowments. In fact the Sajjadanashin of a Khankah occupies a place similar to that of the superior in a Hindu monastery. The Sajjadanashin is entitled to appropriate for his own use a part of the property of a Khankah. He is not only a Mutawalli, but

also a spiritual preceptor and is supposed to continue the spiritual line by means of his selected heirs. He is not a mere officer receiving a return for his service, but is an integral part of the institution whose existence depends on his personality.

It rests now to remark that the fiction theory derived some support from the existence of corporation sole. But the difficulties of squaring the facts with the theory have recently been pointed out by Prof. Geldart "Not long ago" says the Professor, "this University passed a decree recording its gratitude for the munificence of another corporation. Gratitude and munificence are hardly legal conceptions; gratitude and munificence are emphatically qualities of persons. Are we to say that one personality which has no existence outside the sphere of law records its gratitude for the munificence displayed by another equally fictitious personality? Courtesy, I hope is not a fiction, legal or otherwise. How shall we attribute individual munificence to the members of a body whose gift was not derived from their private sources?" These questions may be asked with reference to a corporation sole and the apparent difficulty in finding satisfactory answers vanishes if it is borne in mind that the law is only concerned with analysing such acts as have legal value or legal consequences; it does not profess to

explain every possible expression of human activity. A corporation sole is as much a result of legal necessity as a one-man company. If the latter is a real person so is the former. It need hardly be said that a theory that suggests problems lying outside the legal boundary does not deserve serious attention from a lawyer. The fiction theory may be right or wrong, but it fails to offer any satisfactory solution of difficulties connected with that species of corporations that play such important practical roles in the English the Hindu and the Mahamedan Law. The corporations sole must be taken as they are. The analysis of the technicalities connected with them has fully established the existence of these persons as legal beings.

I pass on to the important subject of *Ultra vires*.

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## NOTES ON LECTURE VII.

THE difficulties inherent in the theory of the corporation sole have been discussed in an essay by Maitland (Law Quarterly Review, Oct. 1900). Maitland remarks "our corporation sole refuses to perform just the first service that we should require at the hands of any reasonable useful *persona ficta*" (*Ibid.*). Again he calls the corporation sole "the mere ghost of fiction." The term was not in use among the lawyers at the time the Year Books were publishing.

2. As to the legal position of Mohants, Shebaites, &c., see 26 C. W. N., p. 537.

3. For a careful review of the legal position of the head of a *Mutt*, the judgment Sir S. S. Ayyar in *Vidyapurna Tirtha Swami v. Vidyanidhi Tirtha Swami* may be consulted. "Having regard to these facts it is obvious that the correct view to be taken is that in the case of *Mutts* the ideal person is the office of the spiritual teacher *Acharya*. ... He is a corporation sole," I. L. R. 27 Madras 442.

4. Recently some doubts have been expressed as to the propriety of the term 'corporation sole' used to designate the legal position of a Hindu idol. True there are some objections to its use if a Hindu idol is by its

means put on the same level with the head of a *Mutt*. But the corporateness of the idol has reference to its juristic nature in some connexions, it does not convert the idol into the manager. The concept is profitable in showing that similar legal needs give rise to similar juridical concepts; (*cf.* Wooddeson Vinerian Lectures on the Laws of England, p. 471 quoted in Sir S. S. Ayyar's judgment.)

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## LECTURE VIII.

### Ultra Vires.

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Brice remarks "the law of Corporations may be considered for most practical purposes as in reality only the application and development of the doctrine of *ultra vires*." The cogency of this remark becomes evident when one understands the meaning of the term *ultra vires*. When a corporation transcends the limits of the powers established by its constitution as embodied in a charter or the articles of association or general law, it is said to have gone beyond the corporate powers. The act done in such a case is an *ultra vires* act. From the practical standpoint a corporation is a legal institution. It denotes as Taylor has pointed out, a body of legal rules in their manifestations in legal relations between persons as to whom a certain mutually related conditions of fact may be affirmed. To know the orbit of the facts that determine the applicability or otherwise of the legal rules means an acquaintance with the acts that may be termed *ultra vires*. Hence the remark of Brice quoted at the start.

Before discussing certain theoretical questions connected with the doctrine of *ultra*

*vires* let us try to find out the genesis of the doctrine itself. The limitations put on corporate activity are of two kinds—internal and external. From the very nature of a corporation as an artificial being it cannot perform certain acts. I have already pointed out to you that this group-person is not comparable to an ordinary physical person in all respects. The fact that the group body is not a natural body renders a strict parallelism between an individual person and group-person impossible. To repeat what has been remarked in a previous lecture, marry it cannot nor can it have a next of kin. The limitation of capacity due to the very structure of the entity is called internal. The other limitation is due to the circumstance of its existence. The legal institution known as a corporation is allowed to exist so long as it fulfils the object of its creation. The state puts certain limitations on its power as a pre-requisite to its legal recognition so that the specific objects for which it has been brought into existence may be carried out. This limitation of corporate activity due to external agency may be termed external limitation and is the basis of the doctrine of *ultra vires*.

It has been remarked by a recent writer that the doctrine is not very old (1). It first

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(1) Carr, loc. cit. p. 64.

appeared in *Colman v. Eastern Counties Railway Co.* in 1846. "Here a railway company had granted a subsidy to a steam packet company running in conjunction with their own lines. The grant having been resolved upon, the minority of the shareholders protested against being bound by the majority in such a matter. The Master of the Rolls held that this was a matter in which the majority could not bind the minority—a matter which, if legal, could be legal only if all concurred." (1) This was distinctly an equitable case. Five years later in the *East Anglian Railway Company v. Eastern Counties Railway Company* it was held that a railway company incorporated under the Act of Parliament was bound to apply its funds for the purposes directed by the Act and for no other purposes. Jervis, C. J., said "they cannot engage in a new trade because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking of the new trade may in some way benefit their line? Whatever be their object or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway and if they cannot embark on a new trade because

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(1) 16 L. J. Ch. 73.



they have only a limited authority, for the same reason they can do nothing not authorized by their Act and not within the scope of their authority" (1). In these two cases the doctrine had a very narrow application. They are authorities for cases between corporation and corporators. When the *ultra vires* Act affects the position of third parties, the bearing of these decisions on such an act is uncertain. There is however a famous decision of 1860 which appears to have settled the law for such cases. The Vice-Chancellor Kindersley extended the principle of *ultra vires* to cover cases where the rights of third parties are affected. In *Attorney-General v. The G. N. Railway Company* the railway company was by statute restrained from trading in coal. The question arose what was the effect of a dealing in coal by the railway company upon the rights of the public. It was held that in the case of an injury to private interest it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the Act creating it and it was competent for the Attorney-General to file an information for an injunction. (2)

Some remarkable results (3) sprang from this extension of the doctrine of *ultra vires*.

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(1) 1. Drewry and Smales, p. 161.

(2) (1851) 21 L. J. C. P. 23.

(3) Carr. *loc. cit.*, p. 66.

“It became possible for corporations to evade liability upon an irksome contract, by shewing their incapacity originally to make the contract. Apart from such a case as this, the law does not look favourably upon a litigant who has made a contract, has had the benefit of it and afterwards claims relief on the ground of incapacity to contract.” It is my purpose to discuss the theoretical foundation of these “remarkable results” in order to make the doctrine of *ultra vires* clear.

The subject may be approached from three view-points which differing in principle have certain points of contact :—(a) the rules of *ultra vires* may be worked out analytically through the general principles of agency and estoppel ; (b) the question may be approached from the standpoint of the first rights of a person who has performed his part ; (c) the principle of absolute limit to corporate activity may be taken as a guiding principle.

The analytical method is justified by the decisions of the American Courts generally. While the principle of justice and the principle of absolute limit are the determining factors in many an English and Indian decision.

The analytical method is based on two definite assumptions regarding the essential character of a corporation. (1) It does not

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(1) Taylor—Private Corporations, p. 228.

trouble much about the conflicting theories of personality. In fact it adopts a practical standpoint and regards a Corporation as a mass of rights and liabilities subsisting as legal relations between persons whose interest in the corporate enterprise are divergent if not conflicting and whose responsibility for any given *ultra vires* act is not always the same. In this view the application of the doctrine of *ultra vires* has reference both to the nature of the act and the relation of the litigants to the act. Thus Sawyer, C. J., said "in considering the cases in which the law applicable to corporations is discussed, it must be always borne in mind that there are several classes of rights to which they apply and that upon the same general state of facts the legal consequences might be different with reference to the different classes of rights. There are corporate rights—that is to say, rights which pertain to corporations as such—the artificial legal entity created by the act of incorporation considered as a single distinct person; there are individual rights of the stockholders as such, and rights of the creditors of the corporation. The rights of strangers dealing with the corporation may vary as they are considered with reference to the corporation itself, the stockholders, or the creditors of the corporation." (1)

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(1) *Miners' Ditch Co. v. Zeller Bach*. 37 Cal. 543.

The second assumption is that the constitution of a corporation and its powers are known to all persons interested in the corporate enterprise or dealing with the corporation, *e.g.*, it was remarked in an American case (1) "persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation."

Taylor suggests the following general proposition. An act beyond the scope of corporate powers, if done on behalf of a corporation or if done by the body corporate itself, affects the rights of persons in respect of the corporate enterprise only in so far as the possessors of those rights by their own acts or omissions have estopped themselves from asserting their rights; provided the act be of such a character that the party dealing with the corporation or its agents could, from an examination of the charter or enabling statute or articles of association, have ascertained that the act was *ultra vires*. Let us examine certain well established rules regarding *ultra vires* acts in order to find out the exact import of this proposition.

Our authorities are unanimous in saying that an *ultra vires* act done by a corporate agent does not bind the corporation. Here

(1) R. R. Co.; 21 How. 441, 443. See also Taylor *loc. cit.* § 264(a).

the equitable doctrine of notice finds a ready application. Persons dealing with the agents of the corporation are affected with the notice of its powers and cannot assume that the agent has the power to do what the principal cannot do. Thus where the trustees of an incorporated savings bank, to the knowledge of the persons dealing with them that there were no funds in the bank for investment, attempted to bind the bank by a contract to take shares in a manufacturing corporation, the Court held that the contract was void. (1) Again the officers of a corporation authorized to do a general insurance agency, commission and brokerage business, cannot on its behalf subscribe to stock in a savings bank, and the bank cannot enforce the subscription. (2) The rule under consideration is concerned with the acts by corporate agents. The corporation when acting in its corporate capacity is likewise under a similar limitation. It cannot validly perform nor ratify an act clearly *ultra vires*. You remember the leading English case on the subject—there the minority of the shareholders successfully opposed the attempt of the majority to bind them. (3) A single dissenting shareholder may restrain the majority from applying the corporate property to unauthorized purposes.

(1) *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43.

(2) *Mutual Savings Bank v. Meriden Agency*, 24 Conn. 159.

(3) *A. G. v. G. N. Railway Co.*, *vide Supra*.

Sometimes an act although *ultra vires* is valid because the different classes of persons interested in the corporate enterprise by ratifying or acquiescing in the unauthorized act estopped themselves from questioning its validity. Thus an *ultra vires* contract is invalid because if enforced it would injure some one's rights. But if persons whose rights are affected themselves assent to be bound by the contract the reason for its invalidity ceases. *Volenti non fit injuria*. If, however, the contract besides being *ultra vires* is illegal the assent of the parties interested will not make it valid. Here, however, we light on a different condition of fact. The *ultra vires* acts are not necessarily illegal acts. The point has been made clear in *Kent v. Quicksilver Mining Co.* "In the application of the doctrine of *ultra vires* it is to be borne in mind that it has two phases: one where the public is concerned: one where the question is between the corporate body and the stockholders in it, or between it and its stockholders and third parties dealing with it and through it with them. When the public is concerned to restrain a corporation within the limits of the power given to it by its charter, an assent by all the stockholders to the use of unauthorized power by the corporate body will be of no avail. When it is a question of the right of a stockholder to restrain the corporate body within its express or

incidental powers, the stockholder may in many cases be denied on the ground of his express assent, or his intelligent though tacit consent to the corporate action. If there be a departure from statutory direction, which is to be considered merely a breach of trust to be restrained by a stockholder, it is pertinent to consider what has been his conduct in regard thereto. A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *mala prohibita*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interest of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stock-holders, dealing in good faith with the corporation, will be protected in reliance on those acts." (1) The remarks of Blackburn, J., in *Taylor v. Chichester, &c. Railway Co.* further illustrate the topic under consideration. He said "I think that any objection made only on the ground that it affects the interests of a shareholder, can only be made by or on behalf of the shareholders. The seemingly technical point raises the question whether the smallest excess of authority renders the whole contract illegal, and so entitles those who have the management

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(1) 78 N. Y. 159, 185. *Lyde v. Eastern Bengal Railway Co.*  
36 Beav. 10.

of the corporation (and who, therefore, presumably were, as individuals, consenting parties to the contract) to repudiate the contract in the name of the Company, however long it has been acquiesced in, and however seriously the position of the plaintiff has been altered in consequence of that acquiescence, or whether the objection should be held to lie only in the mouth of those shareholders who were not consenting parties to the contract sought to be set aside, or have not by laches or otherwise rendered it inequitable in them to set it aside. It is obvious that an adherence to this distinction will prevent those scandalous cases which have rendered the word repudiation a term of opprobrium" (1) So if all the corporators assent to or ratify a contract no one of them can afterwards claim that the contract being *ultra vires* does not bind the corporate funds; an individual corporator can make such claims only as to his own interest in the corporate activity and he is estopped only to that extent by his own act.

It must not, however, be supposed that the assent of corporators collectively makes an *ultra vires* act valid for all purposes and on all occasions. There are other persons besides the corporators interested in the corporate enterprise, e.g., the creditors of a Corporation

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(1) L. R. 2. Ex. 356, 380.



have a great interest in its solvency. These other persons may not have waived their rights and the validity or non-validity of an *ultra vires* act sometimes does depend on considerations relative to these outsiders. In many cases the question of preferential claims among different sets of creditors has to be taken into account, although its bearing on the *ultra vires* act may be settled on common sense grounds. Thus if A has contracted with a company for supply of goods to the company knowing that the company was not authorized to buy the class of goods supplied and demands payment on the ground that the shareholders have ratified the contract, then if the company is solvent and can pay all its creditors, A will no doubt get his due. But if the Company's funds permit only the payment of some creditors but not all then surely the claimants who dealt with the Company while it acted *intra vires* must be preferred to A. There is direct authority for saying (1) that as between creditors of an insolvent bank those whose debts were created under lawful power given by the charter must be preferred to those who claim under a contract which the bank had no power to make. In such cases the bank is not estopped from setting up the illegality or want of power. Thus one comes to the conclusion

(1) See Taylor *loc. cit.*, p. 234. Cases quoted in the note.

that as the funds of a corporation are subscribed for a definite purpose by the shareholders these funds cannot be applied for a purpose other than that authorized by the state. A contract *ultra vires* therefore cannot affect the rights of persons who neither expressly nor impliedly have assented to it.

A contract *ultra vires* may be viewed from another standpoint as suggested in *Bissell v. Rail Road Company* when a corporation has made a contract beyond its powers and has performed its side of the contract, the other contracting party cannot plead in an action on the contract that it was *ultra vires* of the corporation; nor conversely if the other party has performed and the corporation has had the benefit of his performance may the corporation plead that the contract was *ultra vires*. The reason for such a rule is not far to seek. It is a fundamental principle of law that you cannot claim the benefit of an act and repudiate it when loss ensues. The act cannot be dismembered for the unjust benefit of one of the parties. It must be taken or rejected as a whole. In the American case just mentioned the judge observed "I think this doctrine of theoretical perfection in corporations would convert them practically into most mischievous monsters. A bank through its Board of Directors may invest its funds in the purchase of stock, and every holder of the stock may

acquiesce expecting to profit by the speculation. If the enterprise is successful the corporation and the shareholders gain by the result. If a depression occurs in the market and disaster is threatened, the doctrine that a corporation can never act outside its charter enables it to say this is not our dealing and the money used in the adventure may be unconditionally reclaimed from whatever parties have received it in exchange for value, while the injured dealer must seek his remedy against agents perhaps irresponsible and unknown. corporations may thus take all the chances of gain without incurring the hazard of loss."

As in the case of individuals, when a corporation has performed all that it was expected to perform in an agreement the other party cannot object that the agreement was *ultra vires*. Of course this rule applies to an act executed on one side, if the act remains executory on both sides the rule has obviously no application. (1)

So far I have not touched upon the illegality of *ultra vires* acts. I presume that you know the distinction between illegality and invalidity. An act is invalid when it does not bring persons into a contemplated legal relationship and thus fails to attain the object desired, while an act is illegal when it is

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(1) Brice—*Ultra vires*. Taylor, *loc. cit.* Marshall, *loc. cit.* Morawetz, *loc. cit.*

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expressly forbidden by the law. An invalid act if not illegal can be validated while an illegal act can never be made valid. Take for instance the case of a contract not to be performed within a year from the date of agreement. According to § 4 of the famous Statute of Frauds it is to be in writing. If the writing is omitted the contract is unenforcible, but it can be enforced by complying with the terms of the Statute. While a contract for the sale of smuggled opium is always bad. Thus if the managers of a corporate fund divert the money for purposes unconnected with the object of the corporation the act is unauthorized, but not illegal; because the limitation on the powers of the managers exists for the safety of the shareholders and if the latter acquiesce in such a diversion as noticed the act becomes authorized. Let us turn to acts which are *ultra vires* as well as illegal.

In the East Anglian Railway Company v. Eastern Counties Railway Company—a case I have cited before, Jervis, C. J., said with regard to illegal acts as distinguished from *ultra vires* acts that if the contract is illegal as being contrary to the Act of Parliament, it is unnecessary to consider the effect of the sentient shareholders, for if the company is a corporation only for a limited purpose and a contract like that under discussion is not within their authority the assent of all the shareholders to

such a contract though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity or render liable their corporate funds. You notice that here an attempt has been made to show the specific character of illegal acts, but how far successful may well be guessed from the vagueness of the remarks. In fact Blackburn, J., criticized the rule laid down by Jervis, C. J., "I think it very unfortunate that the phrase *ultra vires* has been used to express both an excess of authority as against the shareholders and the doing of an act illegal as being *malum prohibitum* for the two things are substantially different and I think the use of the same phrase for both has produced confusion" (1). An act which is *ultra vires* is not necessarily illegal, but an illegal act must always be *ultra vires*.

Here an attempt may be made to classify *ultra vires* acts which are also illegal:—(a) acts *contra bonos mores*. Holland has drawn attention to these (2). They are *mala in se* and are bad according to the principles of common law. No action can arise out of such acts. But it is necessary that the illegality should inhere in the act sought to be declared illegal. Thus it is no defence to a suit for a debt that it arose from the receipt of the bills of a bank

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(1) Taylor v. Chichester and Midhurst Railway Co., *vide supra*.

(2) Jurisprudence Chap. 3.

illegally chartered for fraudulent purposes and that the bills were void in law and finally proved worthless in fact (1). (b) *Mala prohibita*. These are acts specifically forbidden by a Statute. In the case of many corporations Statutory limitations on the corporate powers occur. Thus a limited Company in India is authorized by the Indian Companies Act to increase its capital or enter into contracts only for objects for which the company has been established. In view of this Statutory restriction a contract for a purpose not included in the memorandum of association cannot be enforced against the company even if the whole body of shareholders assent to it. (2) It is difficult to formulate a rule that will determine the effect of a Statutory prohibition on the validity of acts forbidden. Taylor suggests the following rules:—If a Statute expressly forbids a corporation to make a certain contract the contract is void even though not expressly declared to be so, and is incapable of ratification; and that the contract is void as unlawful, may be pleaded by any one to an action founded directly and expressly on the contract; unless (1) the Statute expressly state what the consequences of violating it shall be and those consequences are other than that

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(1) *Orchard v. Hughes*, 1 Wall. 73.

(2) *Ashley Railway Cast Iron Co. v. Rich.* See Halsbury Laws of England. Vol. XIII.

(2) the statutory prohibition was evidently imposed for the protection of a certain class of persons who alone may take advantage of it; or (3) to adjudge the contract void and incapable of forming the basis of a right of action would clearly frustrate the evident purposes of the prohibition itself. Some concrete examples will make the rule and its qualifications clear.

First as to the rule. It says that a contract expressly forbidden by a statute is void and any one can plead its illegality to an action founded on the contract. Thus if a bank is allowed by an incorporating charter to charge only a given maximum of interest on loans made by it, a note taken by the bank stipulating for a higher rate of interest is void. No action lies on such a note even if it is in the hands of a *bonâ fide* purchaser for value. (1)

Of the qualifications the first one states that the forbidden contract will not be void if the statute, which the contract violates, specifies the consequences of its violation and those consequences are other than that the contract is void and incapable of forming the basis of an action, *e.g.*, in *Pratt v. Short*(2), it was held that the notes or securities taken by the company were void, but the money loaned on them could be recovered because the statute declared that

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(1) *Leavitt v. Palmer*; *Weed v. Snow*; *F. H. Bank v. Bank of Brighton*, 16 Gray 534.

(2) *Taylor, loc. cit.* p. 261.

“no incorporated company without being authorized by law shall employ any part of its effects or be in any way interested in any fund that shall be employed for the purpose of receiving deposits, making discounts or issuing notes or other evidences of debt, to be loaned or put in circulation as money and that all notes or other securities for the payment of money made or given to secure the payment of any money loaned or discounted by any incorporated company contrary to the provisions of the statute shall be void.”

The second qualification states that the contract will not be absolutely void when the prohibition is in the interest of a certain class of persons. This needs no concrete example. It is apparent that when an act is declared void by the legislature for some purposes it is not meant to be void for all purposes. The difficulty in such cases has been created by a confusion of the terms void and voidable even by the law courts. When they say that a contract shall have no force or effect all that they mean is that the contract shall have no force or effect *as against the interest of those* for whose benefit the statutory prohibition was made. In other words the contract shall be *not* void but voidable at the option of the party whose interest was at stake.

The third qualification states that the contract will not be held void and incapable of



constituting the basis of an action, if to do so would frustrate the manifest intent of the statute. Thus where a statute provided that savings banks should make no loans on the security of names alone it was held that the statute should not be construed (1) so as to defeat its own purpose and that a loan made by a savings bank in contravention of it could be recovered and the security given enforced. In another instance the charter of a bank prohibited any director or other officer of the bank under penalty of fine or imprisonment from borrowing money from the bank. It was held that the prohibition did not exempt a director from liability for money loaned to him in violation of the prohibition. (2)

(c) The third class of *ultra vires* acts are those that a corporation cannot do for reasons of public policy. These, however, are neither *contra bonos mores* nor *malaprohibita*. Where a corporation has been formed for a public purpose, it would be unconstitutional for the state to grant it powers and privileges that might defeat the object of the corporation. Any contract entered into by such a corporation, if repugnant to public interest, would be illegal and void. Thus a contract, whereby a street railroad company transfers loan to an individual

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(1) *Firmington Savings Bank v. Fall*. See Taylor, *loc. cit.* p. 262.

(2) Taylor *loc. cit.*, p. 261. Marshall *loc. cit.* § *ultra vires*

for his private use the practically exclusive use of its tracks, is void as against public policy (1). The grounds of illegality of such acts have been well stated in an American case (2). "When a corporation, like a railroad company has granted to it by charter, a franchise intended in large measure to be exercised for the public good, the due performance of those function being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes without the consent of the state to transfer to others the rights and powers conferred by the charter and to relieve the grantees of the burdens which it imposes, is a violation of the contract with the state, and is void as against public policy." Unless expressly authorized a corporation like a railway company or a Cannal Company cannot mortgage its franchises nor consolidate with another corporation.

Before discussing the liability of corporations for benefits derived from *ultra vires* acts it may be useful to consider briefly the question of trusts and monopolies created by a corporation. Although we are not yet familiar in India with pools and cartales still it is instructive to glance at an important legal problem which may some day come to the fore. The

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(1) Gulf &c. Railway Co v. Morris, 67 Tex 692.

(2) Thomas v. The Railroad Co., 101 U. S. 71.

question has been thrashed out in American Courts and no better guide than America—the home of trusts and monopolies—is obtainable at present.

The Act of Congress of July 2, 1890 aims at protecting trade and commerce against unlawful restraints and monopolies. By this act "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal." The principle of this act has a very wide application. It applies not only to common carriers and private companies but to corporations of all kinds. They are not allowed to combine for the purpose of stifling competition in trade. A combination of corporations that would result in a monopoly that is to say would form a "trust" in the popular sense is *ultra vires*, illegal and void. The corporations cannot enter into an agreement to form such a combination either by formal corporate act or by the agents of corporations. In the cases of *People v. North River Sugar Refining Company* and *State v. Standard Oil Company* the above principles were discussed and finally adopted in the form just stated (1). In both these cases it was held that there could be no partnership of

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(1) *U. S. v. Freight Association*, 166 U. S. 290. *U. S. v. Joint Traffic Association*, 171 U. S. 505. *U. S. v. Pipe Company*, 85 Fed. Rep. 271, 49 O. St. 137, 184, do. 121 N. Y. 532, 625.

separate and independent corporations, whether directly or indirectly through the medium of a trust, no substantial consolidations which avoid and disregard the statutory permission and restraints. The Standard oil case lays down moreover the justificatory conditions of *quo warranto* proceedings. "Where all or a majority of the stockholders comprising a corporation do an act which is designed to affect the property and bussiness of the company, and which through the control their numbers give them over the selection and conduct of the corporate agencies does affect the property and business of the company in the same manner as if it had been a formal resolution of its board of directors; and the act so done is *ultra vires* of the corporation and against public policy, and was done by them in their individual capacity for the purpose of concealing their real purpose and object, the act should be regarded as the act of the corporation, and to prevent the abuse of corporate power may be challenged as such by the state in a proceeding *quo warranto*." (1) I may mention in passing that in America a proceeding *quo warranto* may disenfranchise a corporation and thus dissolve it. Perhaps the immediate connection of the principle of the

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(1) U. S. v. Freight Association, 166 U. S. 290. U. S. v. Joint Traffic Association, 171 U. S. 505. U. S. v. Pipe Company, 85 Fed. Rep. 271, 49 O. St. 137, 184, do 121 N. Y. 582, 625.

American Law with that of the Indian System is far to seek. But it must be borne in mind that the Indian Law of Corporations is still in its infancy and Indian authorities on many of the fundamental questions in corporation law are almost absent. Of course there are fairly numerous decisions of Indian courts on certain sections of the Indian Companies Acts, the Indian Railways Acts and the Municipal Acts. But these latter refer in general to questions of detail rather than to the principles of our subject. In the absence of home authorities one must go to foreign countries.

Now as to the liability of corporations for benefits received under an *ultra vires* act. Here again the distinction between acts which are merely *ultra vires* and those which are illegal as well must be borne in mind ; with regard to the former Brice says "though a corporation cannot be sued, anymore than any other citizen directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defence it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so it must repudiate altogether—it cannot reprobate and approbate, it cannot reject and yet keep what in another form it has rejected." (1) This statement admirably sums up the law on the point. The only exception to the rule

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(1) Brice *ultra vires*, p. 769.

has been noticed in Hill's case (1) where it was observed that a corporation might repudiate a contract without rendering up the benefits which through the contract had accrued to the corporate property, when such benefits had become amalgamated with the corporate property and could not be rendered up without infringing the rights of persons who had never assented to the contract nor in any way acquiesced in it. Of course the benefits in such a case must be so indistinguishably interwoven with corporate property as to make a restitution *in integro* impossible. Thus when through an *ultra vires* transaction money has come into the possession of a corporation and has been applied to proper corporate purposes, the corporation in repudiating the transaction will have to refund the money so applied (2). So in Burges and Stock's case (3) the holders of Marine Insurance policies which the company was not authorized to issue, were allowed on winding up the company to recover the premiums paid by them on such policies, but were not allowed to recover the value of the policies. Page-Wood V. C. remarked "they have had no consideration for the premiums they pay. The directors, it is true, had no power to issue marine policies, but they had power to receive

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(1) L. R. 9 Eq. 605.

(2) German National Bank v. Butchers & Co., 97 Ky.

(3) Taylor, loc. cit. p. 262.

money and apply it to the benefit of the company. It is proved that they did so receive and apply their premiums and the amount might have been recovered even at law as money had and received." In all these cases the basis of liability is that the benefit was appropriated to the uses of the corporation with its consent. The consent of a corporation may be given either by a corporate act or by an agent acting on behalf of the corporation. If the corporation has no choice in the matter that is to say if it is precluded from rejecting the offered benefit it cannot be made liable for retaining it. Here the remedy is to claim the specific property if it can be traced. If, however, the contract is illegal as well as *ultra vires* a different rule would apply. An illegal contract may be rescinded while it is still executory and the permitting the plaintiff to recover money advanced by him is not allowing the contract to be performed but the effect is to restore the status quo, *e.g.*, in *White v. Franklin Bank* (1) where a deposit was made in a bank and the depositor received a book containing the cashier's certificate that the money was to remain on deposit for a certain length of time, it was held that such a stipulation was void as amounting to a contract on the part of the bank for the payment of money at a future day

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(1) 22 Pick 181.

certain, a contract prohibited by statute. But the court added that though no action could be maintained by the depositor on the stipulation, still he could recover the money before the expiration of the time for which it was to remain on deposit and that too without any previous demand on the bank. One may ask, is it conceivable that a corporation may seek for a relief on the ground of public policy even though it has been a *particeps criminis*? This point was raised in an American Case and the view taken there was that the court would relieve a corporation in so far as public interest required and no further (1). There are, however, no Indian decisions on this important question.

So far I have been discussing the liability of the corporation to refund when it has benefited out of an *ultra vires* act. What about the other party to a contract that is *ultra vires* as well as illegal? Clearly justice would require that the other party must refund to the extent of the benefit it has received, except where both the corporation and the other contracting party have received benefits under a partially executed contract. In the American Union Telegraphic Company v. Union Pacific Railway Company, Judge Macray said, "many cases hold that a corporation

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(1) Taylor *loc. cit.* p. 265.



which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power but that doctrine does not apply to a case where a party comes into a court of equity, and while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other." It appears then that under these circumstances the court will order a restitution of *status quo*.

All that I have told you so far applies to corporations generally. But when one comes to public corporations like the Municipalities and County Council, &c., and such like bodies for local government some modification of the statements already made is necessary. A Municipal Corporation is but a part of the state. The legislature can make it a state in miniature or it may be bereft of many important features of a corporation in general. It has no inherent power to legislate, all its powers are derived from the charter or an incorporating Act. The questions of *ultra vires* are to be settled in the case of municipalities by special reference to

the statutes creating them. The matter is so full of difficulties and the details are so many that one cannot enter into a full discussion of the topic in a general course on the principles of corporation law. I may take one or two Indian cases illustrating the principle of *ultra vires* with reference to municipalities that will at the same time bring out the peculiarities of the Indian law. In the *Chairman of Giridi Municipality v. Sris Chunder Mazumdar* (1), a rate-payer who occupied a holding within the municipal limits was assessed with an annual tax with reference to the salary carried by him within the municipality. He took exception to the assessment under section 113 of the Bengal Municipal Act but his application was rejected by the municipal authorities without recourse to the procedure laid down in section 114 of the Act and he declined to pay the sum assessed. The municipality brought a suit against him for recovery of arrears of tax. Upon an objection taken by the defendant that the assessment was *ultra vires* and that it was not made according to his "circumstances, and property" meant the whole amount he earned and not what he spent within the municipality, the lower court decided in the defendant's favour and the Municipality moved the High Court. Mookerjee, J. said "it is contended

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(1) (1908) I. L. R. 35 Cal. 859; 7 C. L. J. 631.

on behalf of the plaintiff that as an application for review presented by the defendant has been rejected under section 114 the assessment has become final under section 116, that its legality could not be questioned either directly or collaterally before the civil court and that consequently the plaintiff is entitled to a decree for the entire sum claimed. Section 116 says that no objection shall be taken to any assessment or rate in any other manner than in this Act provided. It is contended that a remedy by recourse to a regular suit in a civil court for cancellation of the assessment or by way of a proper defence to an action by the municipality in a civil court for recovery of assessed taxes is not expressly mentioned as a possible mode of objection in any portion of the Act, nor is such a remedy, it is asserted, contemplated by the legislature. This contention however, is not well founded upon principle and is not supported by any authority." After quoting several authorities in support of his statement Mr. Justice Mookherjee further said with regard to the question of *ultra vires* that the "true test is whether there has been a substantial disregard of the provisions of the law which creates the authority of the municipality and regulates its powers and duties. A similar view had been taken in *Nanda Lal Bose v. Corporation of Calcutta* in which Sir Richard Garth relied in support of this position

upon the principle deducible from *R. v. Morley* and *R. v. Peowright* which shows that the distinction recognized between a case in which the corporation has acted within its powers but probably exercised an erroneous discretion and another in which the corporation has acted in contravention of its powers is analogous to the distinction between an error of fact and an error of law.....The essence of the matter is that the action of the municipality is in its nature quasi-judicial and is not subject to collateral attack except on the ground of fraud or on the ground of exercise of a power not conferred by the statute" (1). It is plain that in the case of Indian municipalities the test of an *ultra vires* act is similar to that obtaining in the English Law. The peculiarity if any is referable to the statute itself.

In the *Chairman of Chittagong Municipality v. Jogesh Chander Roy* the appointment of a paid assessor was attacked as *ultra vires* because the question of appointment under § 46 of the Bengal Municipal Act was raised at a meeting of the municipal commissioners as an amendment to a substantive motion, the amendment was lost; but the same question was again raised as a substantive proposition within six months from the date of the first

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(1) I. L. R. 34 Cal., p. 859.

meeting and was carried. The court held that the appointment of the paid assessor was not *ultra vires* in as much as the subject of the appointment of an assessor had not been finally disposed of at the first meeting and therefore its reconsideration was permissible (1). It is no use multiplying examples of this type. The Indian decisions clearly prove that the question of *ultra vires* is determined by the rules of the statutes of incorporation so far as municipalities are concerned.

I may mention in passing that a frequent question arises in municipalities as to whether a mis-application of municipal fund has been an *ultra vires* act. The point was discussed in *Vaman v. The Municipality of Sholapur* and it was decided that a tax-payer was competent to sue for an injunction to prevent an appropriation by a municipality of any portion of its fund to a purpose not allowed by the act (2). Evidently then a misapplication of the fund is *ultra vires* and the ratio decidendi is the principle that the incorporating act is the determining factor.

In view of the conflicting decisions of the courts and the division of opinion among text writers it may be useful to give a general summary of the rules regarding the effect of *ultra vires* contracts. Marshall has summarized

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(1) I. L. R. 37 Cal., p. 44.

(2) I. L. R. 6 Bom., p. 646.

them as follows:—(1) If the contract is fully executed on both sides, the courts will not interfere to deprive either party of what has been acquired under it. (2) If the contract is executory on both sides, it is void and as a rule neither party can maintain an action either for specific performance or to recover damages for non-performance. And this rule applies notwithstanding the contract has been partly performed on both sides. (3) Where the contract is executory on one side only and has been fully executed on the other side, so that one of the parties has furnished the consideration the courts differ as to whether an action will lie on the contract by the party thus furnishing the consideration. Some courts hold that the express contract is void and that no action will lie upon it, the remedy, if any being quasi-ex-contractu for what has been received under the contract. Other courts hold that the party thus receiving the consideration is estopped from setting up that the contract is *ultra vires* in order to defeat an action on the contract. (4) When either of the parties to an *ultra vires* contract has received money or property under the same, it must be restored on repudiating the contract. (5) A corporation is liable on a contract which is apparently within its powers, although it is rendered *ultra vires* by reason of extrinsic facts, if such facts were not within the knowledge of the

other party. (6) If a corporation has the power under some circumstances, to become a party to negotiable instruments, and it does so for an unauthorized purpose, it cannot set up the defence of *ultra vires* as against a *bonâ fide* purchaser for value. (7) If a contract is *ultra vires* in part only, the part which is authorized may be enforced, if it can be separated from the part which is unauthorized. (8) A corporation may set up the defence of *ultra vires* when sued on a contract entered into by it as agent for an undisclosed principal. (9) A corporation is not liable on a contract into which it has entered without complying with mandatory charter or statutory requirements as to form or mode of contracting so long as the contract is wholly executory. But it is liable for the contract that has been executed by the other party (1).

The lack of principle and consistency in the judicial treatment of these acts is due probably to faulty views of the nature of corporate acting capacity. If one regards the principle of representation as a creature of law solely and wholly all corporate acting capacity involving that principle must have a rigid limit. What becomes then of *ultra vires* acts? They are not merely irregular in form but they are acts which the corporation could not do without having its constitution changed. An *ultra vires* act may violate rights in two

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(1) Marshall—Op. cit., *ultra vires*.

different directions—it may operate against the corporators who do not concur, it may militate against the state that has formulated certain conditions precedent to incorporation. Consequently a double barrier is opposed to the legality of these acts one of which is sure to stand even though the other is removed.

Freund supposes that in these circumstances one or two alternative positions must be taken. Either the law by the creation of the corporation bestows upon it “the fullest acting capacity, while at the sametime it forbids its use beyond the limits of the charter powers. This is a possible and workable theory; it is supported by some writers as the general capacity doctrine. Or the law confers acting capacity only to a limited extent as an aid and instrument to the accomplishment of the charter purposes” (1). On the former alternative every act done by corporate authorities in the corporate name is a corporate act by legal creation and legal sanction. The act may be wrongful illegal and even voidable but it cannot be void. “For if it is void the law creates only in order to deny its creation, it gives with one hand and takes with the other. A void corporate act, which in order to be a corporate act, must first have been called into existence by the fiat of the law, is necessarily an anomaly.” On the latter supposition every act beyond the

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(1) Freund—*The Legal Nature of Corporations*, p. 62.



corporate powers attempts to attach to the corporation rights and liabilities which it has not acquired or assumed. Therefore an *ultra vires* act is an impossibility in this view.

If, however, the principle of representation is regarded as expressed in the corporate acting capacity, the recognition of an *ultra vires* act does not involve any logical inconsistency. A distinction arises only between corporate acting capacity and corporate powers; the former may exist to its fullest extent while the latter is limited by the instrument of incorporation. Where therefore an act is done in the corporate name, but beyond the corporate powers, it should first be determined whether the act can morally or psychologically be attributed to the body corporate as truly representative in character. The test must be two-fold: first, is the act done in the corporate interest, *i.e.*, for the real or plausible advancement of common purposes? and second: is it done by organs whose position is for the doing of this kind of acts representative? It would be probably difficult to discover any *ultra vires* act with which the courts have had to deal, which was not corporate upon both the tests advanced, because without their presence as a justification it would probably not be attempted to fasten an act upon a corporation. If a Railroad Company runs a steam boat, if a manufacturing company builds houses and

rents them to its employees, if a business corporation subscribes money to secure the location of a public building near its premises, even where a Railroad Company guarantees the expenses of a musical festival which promises to attract many visitors to a city, the common interest is obvious. Take the extreme case of a city running a distillery. (1) A municipal corporation is organized for government, but incidental to government is the possession of property and the possession of property requires its profitable use and investment. What shall constitute a proper investment is a matter of policy, it may be a loan on security, holding of real estate or industrial enterprise; if it is contended that industrial activity is not properly investment, it may be answered that the foreclosure of a mortgage may lead to it as a practical necessity. If, however, such connection with common purposes cannot be established the act cannot be called corporate in any sense: so if a bank cashier should pay an individual debt with moneys belonging to the bank, it would simply be a conversion of corporate funds and no one would speak of an *Ultra Vires* act. And so the *ultra vires* act in order to be corporate must be done by an officer whose position for that purpose is representative; if a freight agent had guaranteed

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(1) *Salt Lake City v. Hollister*, 118 U. S. 256, *vide* also cases cited *supra*.

the expenses of a musical festival, his act would never have been attempted to be imputed to the Railroad Company, but the act of a freight agent in taking goods for transportation beyond the line of his company, though it may be *ultra vires*, may yet be corporate. As a rule, however, *ultra vires* acts must be either done or authorized by governing boards or general managing officers, whose acts are *primâ facie* representative."

The general principle underlying the treatment of *Ultra Vires* acts has so well been set forth by Prof. Freund that I cannot do better than quote his words in full as a sequel to what has been said in different contexts in the present lecture (1). "The recognition of an *ultra vires* act as corporate is quite consistent with the view that it is an act which is illegal as violating shareholders' rights or legal restriction or both. Upon the ground of mere illegality, however, different methods of legal treatment are possible.

First: An illegal act may in law be treated as *void*, *i.e.*, it may be deprived of its intended effect. This is specially possible where the act in order to be effectual requires legal enforcement, of which a broken executory contract is the typical example. Any unconsummated act, the consummation of which can be prevented by judicial decree, as, *e.g.*, a

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(1) Freund—Legal nature of Corporations, pp. 22—24.

resolution, an order or any documentary declaration, stands upon the same footing. If such an act is *void*, a defence raised by any body, or an appropriate action brought by any one having an actionable interest, will result in a judicial declaration of nullity, which, however, adds nothing to the legal nullity of the act. If the act is executed and consummated by transfer of possession or otherwise, the legal view may still on principle be the same, there may be complete failure of title or failure of consideration, but the law cannot prevent actual conditions from having their natural effect, and the result must be in many cases confusion or injustice or both. Such a state of facts may then again be counteracted by appropriate remedies, the purpose of which will be to restore the parties to their equitable rights. Thus in *Central Transportation Company v. Pullman Palace Car Company* it was remarked that the courts while refusing to maintain any action upon the unlawful contract, had always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money parted with on the faith of the unlawful contract to be recovered back or compensation to be made for it.

Second: The law may treat the *ultra vires* act as simply wrongful and not as *void*. In

purely executory acts the result will often be the same, since the prevention of a wrongful act or a successful defence to it while in this stage, will leave it altogether without effect. There will be this difference, however, that the wrongfulness could not be taken advantage of by parties whose rights are not violated. Where therefore the performance of an *ultra vires* contract is successfully resisted either by the corporation making it or by the other contracting party, it is clear that the contract is treated as *void* and not as simply wrongful. Where, however, *ultra vires* acts are fully executed, the law in most cases practically proceeds upon the view that the act is merely wrongful. This may still give to the aggrieved party a right in equity to demand rescission or cancellation or an injunction restraining the enjoyment of the rights held wrongfully, or it may result in the recognition of the *ultra vires* act as having its full intended effect, throwing the aggrieved party back upon the other remedies. So the injured corporation may sue the directors for damages, and above all the state may institute proceedings against the corporation violating its charter for a forfeiture of its franchises or for its dissolution, proceedings which cannot effect a confiscation of the beneficial interest in the fruits of the *ultra vires* acts. Such proceedings are of course based upon the theory that the acts

complained of, while *ultra vires* and illegal, must be attributed to the corporation.

Whether *ultra vires* acts shall be treated as *void* or as wrongful, is a question of legal policy, which is not affected by any theory of corporate existence. It is simply a part of the larger question how, in general, acts beyond legal power for violating legal prohibitions shall be dealt with—one of the most difficult and unsettled legal problems. The position of the law may vary according as the act is simply beyond the charter power, or also against public policy, immoral, or expressly prohibited, also according as the corporation is public or private. The decision therefore turns on other points than the nature of corporate acting capacity.”

Perhaps some of you will ask that if corporate acting capacity is purely a gift of the law how is a corporate tort to be distinguished from a corporate *ultra vires* act? A practical distinction is made between the two, and torts are treated as corporate acts. The reason is that the *ultra vires* act is done to produce legal consequences and consequently aims at widening the orbit of corporate activity while the tort being merely an incident to the exercise of valid powers, has no such tendency or effect. To treat the tort as void would cause consequently unnecessary hardship to

the injured party. Hence the distinction obtaining in practice. Such is the general theory of *ultra vires*. I proceed now to discuss the nature of trading corporations.

### NOTES ON LECTURE VIII.

1. For a detailed discussion of the practical questions relating to *ultra vires* acts. Brice on *ultra vires* may be consulted. The law on this topic, so far as British India is concerned, has been the subject of Tagore Lectures by the late Mr. S. R. Das.

2. The English doctrine of "*ultra vires*" does not really go back to any ultimate conception as to the nature of a corporate body"—Pollock. *Essays in the Law*, pp. 156—7. This remark should be borne in mind while drawing any speculative inference from English decisions on questions bearing on constitutional limitations of corporate bodies.

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## LECTURE IX

### Trading Corporations.

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*Trading Companies.* These are the most important examples of trading corporations. A company is to be distinguished from other associations for business purposes. Lord Lindley the greatest authority on Company Law describes a company as an association of many persons, who contribute money or money's worth to a common stock and employ it for some common purpose. It is distinguished from a partnership by the fact that while a partnership is an amorphous combination of many where the individuals do not lose themselves in the group a company is an association crystallized into a group-person. Although a company may be a quasi corporation, *e.g.*, where it is unincorporated, but at the same time privileged to sue or be sued in the name of some public officer, (1) yet it is as a group-person that a company incorporated under the English or Indian Companies Acts plays its juridical part. The essential characteristics of a Joint-Stock Company are : (a) It can sue or be sued in a collective name. (b) Its property or capital is represented in shares and certificates of

(1) Lindley—*On Companies*, Vol. I, pp. 1 & 2.



stocks like those of other trading corporations. (c) The death of a member, his insolvency or the sale or transfer of his interest is not a dissolution of the company. (d) It has the immortality of a corporation and consequently it can take and hold real and personal estate in a collective capacity and in perpetual succession. (1) Before discussing the fundamental principles of company law it is instructive to follow the main lines of development of companies into juristic persons.

The legal development of companies in England may conveniently be traced from the time of Elizabeth. The England of Elizabeth became "national" in the true sense of the word. "The epithet might be applied to it from diverse stand points—government, religion, literature, learning, economics and industry. The general religious and intellectual activity of the 16th century had brought to the knowledge of the English people the existence of a great world of material wealth outside the restricted boundaries of their Island and for the Anglo-Saxon to know of its existence was for him to covet it. "The peace and quietude of Elizabeth's long reign permitted a sufficient accumulation of capital in England to enable her people to follow the lead of the Spanish, Portuguese and Dutch in

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(1) Abbot—Digest of the Law of Corporations. Title Joint Stock Company.

the exploitation of new world" (1). The contact of the English with other nations led to the development of English commerce and the practical question of the means of extending the foreign commerce became more and more pressing. International law had not yet offered the perfect security to traders in foreign lands, a stranger in a strange land was not always hospitably received. The crown in the 17th century was equally powerless to afford protection to English vessels on the highways of the ocean. The crown simply delegated its function of protection to recognized bodies of foreign merchants who were empowered to use such measures as the purposes of trades and safety of persons engaged in them might require. These bodies fell into four classes, *viz.* : (1) Regulated Companies, (2) Exclusive and Semi-Regulated Companies, (3) Joint-Stock Companies (4), Colonial Companies. The last class does not concern us so much as the other three.

The Regulated Companies were mere relations of the older guilds. In fact they arose from the application of the principles of domestic trade to foreign trade and industry. They were organisations of the merchants carrying on commerce with Flanders, the Netherlands, Denmark, the Scandinavian and

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(1) Davies—History of Corporations, Vol. II, p. 219.

Baltic countries. The English Merchants in France, Italy, Spain and Portugal appear never to have had an enduring corporate organisation. The foreign merchants, however, always group themselves into compact leagues more or less akin to corporations. The most important of these organisations was the famous Hanseatic League with its head-quarters at the Steel Yard in London.

The student of economics may very well consult Ashley's English Economic History for a detailed description of old English leagues, but the lawyer is permitted to leave detailed economic history alone; the only important thing for him to know is that these leagues grew into corporate bodies through the grant of charters to many of them by the English kings. Thus the earliest organisation of the English merchants that came in direct contact with the foreigners was that of the staplers. It is known that in the time of Henry III a wool-staple existed, although no definite instance of a staple trading with foreigners before the 14th century is known. These staplers were granted charters during the 14th century for the protection of their trading interests. But they were generally managed by the city Mayor and their corporate character was rudimentary. It was at the beginning of the 15th century when Henry IV granted a charter *pro mercatoribus Holendiae* by which the

English merchants in Holland, Zealand, Flanders and other lands over sea had conceded to them the power of electing governors for the administration of justice and the adjustment of controversies among them that the groups of traders were passing from an amorphous into a crystallized state. When the traders appeared in groups regulated by special laws they came to be known as the Regulated Companies.

Exclusive and Semi-Regulated Companies : After the Regulated Companies arose a second type of companies that may be termed Semi-Regulated. These tended to become exclusive as they were not allowed to admit to membership more than a given number of traders. These were midway between Regulated Companies and Joint-Stock Companies. The best example of a Semi-Regulated Company is the Levant or Turkey Company. The English trade with the countries on the Eastern Mediterranean, with Greece and Turkey and with Asiatic countries to the south east as far as India had long been carried on wholly overland, or partly overland and partly by the Mediterranean as far westward as Italy or France. The English merchants participated in this trade only mediately through the Venetian and other Italian Merchants. "In the 15th century, however, the routes by water came to be used and merchants of Portugal

served partly as media for the supply of England with Eastern merchandise. (1) In the same century English Merchants began to meet this branch of foreign trade as it had met that of the Netherlands and Holland. In 1455 there appears to have been a sufficient body of English merchants in Italy to justify the appointment by Richard III of a Consul for them at Pisa. Soon afterwards in the reign of Henry VII a few efforts were made by English adventurers to establish a trade in the Barbary State." These attempts were responsible for the establishment of the Barbary Company which later on developed into the Levant Company when Elizabeth in 1581 granted certain English subjects, their executors and administrators a charter to trade to Turkey exclusively under the name of the Company of the Merchants of the Levant. The maximum number of persons to be formed into the Levant Company was fixed by the charter. The company was allowed the power to enact by-laws for their good government. The Levant Company as a type of other exclusive Semi-Regulated Companies was limited as to the number of members, the number of countries with which it could trade and had the power to manage its own affairs through its own directors unhampered by any specific law. The principle

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(1) Davies—*Loc. cit.*, p. 222

of joint-stock was applied here to a limited extent. (1)

The Joint-Stock Companies: These are the common examples of modern trading corporations. The principle of Joint-stock was not applied in purely regulated Companies and only to a partial extent in semi-regulated ones. But it is this principle that has made the Joint-Stock Companies the most powerful corporations of the present day. The father of the Joint-stock Companies is the East India Company. We are interested in this particular Company historically socially and legally. A lecturer on Indian corporations cannot but enter into some details of the Company that has been responsible, although mediately, for the establishment of the Tagore chair of law.

The East Indian Company was partially an outgrowth of the Levant Company which as I have told you, was a typical semi-Regulated Company. The Court Records of the East Indian Company show that the Governor of the Levant Company—Sir Thomas Smith—was also a Governor of the East India Company. On the 31st December, 1600 Elizabeth “granted to George, Earl of Sunderland and 215 others that they from henceforth be one body corporate and politic by the name of the Governor and Company of merchants of

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(1) DAVIES—[*loc. cit.*, Vol. II.

London, trading into the East Indias, have corporate succession with power to admit and expell members, be capable of receiving, holding and granting property, sue and be sued in the corporate name and use a common seal. The direction of the voyages, the provisions of the shipping and merchandise there to belonging, the sale of all merchandise returned in the voyages, and the managing and handling of all other things belonging to the Company were reposed in a Governor, Deputy Governor and 24 directors elected annually by the members of the Company at a general court but removable by them at any time. For a term of 15 years the members of the Company and their sons who had attained majority were empowered to make such reasonable laws, constitutions, orders and ordinances as to them shall seem necessary and convenient for the good government of the Company and all factors, master mariners, and other officers employed in any of their voyages and for the better advancement and continuance of their trade.

Nine voyages were made from 1601 to 1613. The first proved extremely profitable, the vessels fitted out in 1607 were lost at sea. In the 7th voyage in 1610 several classes of adventurers united and were called joint adventures. The authority exercised by the corporation on its members was that of a regulated Company,

because all the adventures had been undertaken by groups of members of the Company on Joint-Stocks and not by the Company in its corporate capacity. The Company had, however, obtained in 1609 a confirmation of their charter from James I, with an amendment making it perpetual, but revokable on three year's warning. "Their monopoly had been maintained intact during the life of Elizabeth, but James I in 1604 had granted to Sir Edward Michelborne and his associates a license to discover the countries and dominions of Cathaia, China, Japan, Corea and Cambaia and the islands and countries thereunto adjoining and to tread with the people inhabiting them not as yet frequented and traded unto by British subjects or people," (1) In 1635 Charles I granted several people a license to trade in the territory of the East India Company and in 1637 he confirmed the privileges already granted "as to all places in India where the old Company had not settled any factories or trade before the 12th of December 1635." (2) On the accession of Charles II a new charter substantially increased the body of powers already possessed by the Company. In 1669 the port of Bombay which had been ceded to Charles by Portugal in accordance with his marriage contract was coveyed by him to the East India

(1) Anderson—*History of Commerce*, Vol. II, p. 372.

(2) Bucre—*Annals*, Vol. I, p. 330.



Company with power to govern it by laws enacted by the Company. No other condition was imposed than that the laws were "to be reasonable and not repugnant or contrary, but as near as may be agreeable to the laws statutes Government and policy of England." (1)

Even at the Restoration the East India Company was not fully developed into a perfect Joint-stock corporation, because the Joint-stock about this time was variable formed by the sums which the individuals who were free of the Company chose to pay into the hands of the Directors receiving credit for the amount on the Company's books and proportional dividends on the profits of the voyage. (2) It was after the revolution of 1688 that the Company reached its final stage of development. According to the political theory of this period the monopolies of trade could be granted by Act of Parliament. On this principle the commons began an active interference in the affairs of the East India Company. In 1689 a committee of investigation reported "that the best way to manage the East India trade is to have it in a new Company and a new Joint-stock and this to be established by Act of Parliament, but the present Company to continue the trade, exclusive of all others either interlopers or

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(1) Letters Patent granted to the East India Company, pp. 80—90.

(2) Mill—History of British India, Vol. I, pp. 64—65.

permission ships, till it be established" (1). The Parliament, however, failed to legislate and the affairs of the Company were left to the king who confirmed their chartered rights without any diminution in 1693. In the same year a new charter was granted which recognized to some extent the rights of traders outside the old company. Next year the House of Commons resolved that "it is the right of all Englishmen to trade to the East Indies on any part of the world unless prohibited by Act of Parliament. The East India Company now sought to have their powers sanctioned by Parliament. The result of the struggle of the old Company against its opponents was however an Act favourable to the latter. The old East India Company still had three years of corporate life and it succeeded in 1699 in obtaining an Act of Parliament which granted it to trade by Joint-stock and when it presented the new charter to king William he recommended it to unite with the English Company. The terms of the union were finally settled in the reign of Queen Anne.

It was in the first year of the 18th century that the legal development of the East India Company was complete. The subsequent history is merely political and does not concern us here. All that is necessary to notice is that the Joint-stock principle empowered a group of

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(1) Letters Patent granted to East Indian Company, pp. 150, 151.  
(2) Bruce—*Op. cit.*, Vol. III, p. 82.

men to manage their business with the help of functionaries elected from amongst them and bye-laws made by them. The fundamental feature of government by some of the representatives made itself manifest very early in the career of this typical Joint-stock Company. Let us examine the principles of government applicable to trading corporations.

The subject of government has been treated<sup>26</sup> by Messrs. Clare and Ramsbotham in Halsbury's Laws of England in a general way. The law as laid down there applies to Indian Companies in most of the cases. In treating of this subject I shall follow Halsbury.

The first point to notice with regard to government is the appointment of officers. It is impossible to make any general statement as to the offices which may be present in a corporation, because they vary according to the exigencies of circumstances. The only rule that is of general application is that when an office becomes vacant the corporation has a right to have it filled. A corporation by its bye-laws may determine the conditions on which an office may be held. In the case of statutory companies especially in India the incorporating statute does not specify the number of officers but leaves it to the discretion of the shareholders. Certain provisions regarding management and administration are found in the statute but these are provisions

for protection of creditors. Thus in the Indian Companies Act, 1882 all that is required for the safety of the creditors is found in §§ 63-66. There nothing is mentioned as to the choice of a director or manager or any other officer of a Company but provisions are made regarding the registration of office and penalties for non-publication of the Companies' name.

Another topic of importance so far as the government of a joint-stock Company is concerned refers to the convention of meetings. A corporation can only do corporate acts at a meeting unless a special method is authorized by the incorporating Act. In the case of Indian Companies a general meeting of every Company under the Act is to be held once at least in every year. The Company may alter regulations by special resolutions in such general meetings. *E.g.*, § 76 of the Indian Companies Act, 1882 says "Subject to the provisions of this Act and to the conditions mentioned in the memorandum of association, any Company formed under this Act or the Indian Companies Act, 1866, may, in general meeting, from time to time, by passing a special resolution, alter all or any of the regulations of the Company contained in the articles of association." The Act in this case limits the resolution to a particular type. The resolution is to be a special resolution. The latter is defined by the Act to be a resolution passed by a majority

of not less than three-fourths of such members of the Company, for the time being entitled, according to the regulations of the Company, to vote, as may be present in person or by proxy at any general meeting, of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members, for the time being entitled, according to the regulations of the Company, to vote as may be present, in person or by proxy at a subsequent general meeting of which notice has been duly given and held at an interval of not less than 14 days nor more than one month from the date of the meeting at which such resolution was first passed.

It appears that in the case of Indian Companies it is essential to observe the procedure laid down in the Act itself for the change of regulations once adopted by a statutory Company. Sometimes important questions arise in connection with the internal defects in the management of a limited Company. Thus in *Raja Bahadur Shivalal Motilal v. The Tricunidas Mills Company, Ltd.*, it was necessary to decide whether an innocent party was affected by the defective management of a Company. This case decided some important questions of law and it is necessary to set out the facts in some detail before entering into the questions of law.

By a mortgage of the 15th April, 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs. Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he appointed one Dani, his *munim* in Bombay, as such nominee. In June 1907 the defendants borrowed three lacs on a cash credit opened with the Bank of India for one year from 11th June, 1907. The said transaction was made conditionally on the defendants giving an undertaking not to further charge the property previously mortgaged to the plaintiff and resolution to that effect was passed at a meeting of the defendants' directors at which Dani was present. No letter of undertaking was in fact given. The loan from the Bank of India was renewed at the end of the year for another year. The bank made some attempt to obtain a higher rate of interest, but in the end the loan was renewed at the same rate as before. In 1909 the defendants failed to pay the said loan to the Bank of India when due. Finally the said loan was renewed for three months on further security being given on 30th June, 1909. On 5th August, 1909 the defendants applied to the plaintiff for a further advance of 5 lacs of which 2 lacs were required urgently on the security of the said property mortgaged to the plaintiff. The plaintiff consulted Dani

who approved of the transaction. The plaintiff thereon advanced two lacs and received a receipt for the sum in which it was stated that the said two lacs formed part of a sum of five lacs intended to be advanced by the plaintiff, that the plaintiff should have time to consider whether he would advance the said sum of five lacs as a further charge and that in the event of the plaintiff deciding to advance such sum the defendants would execute a proper legal deed of charge to secure such sum and interest and in the event of the plaintiff deciding not to make such further advance the said sum of two lacs should be repaid immediately with interest and together with the original loan of six lacs. At the date of the said receipt there were only three directors of the defendants and not four, the minimum number under the articles of association of the defendants. Thereafter the plaintiff decided to make the proposed advance and signified his intention to the defendants. A formal deed of charge was prepared but not executed owing to the insolvency of the defendants and other circumstances. On August 10th the plaintiff for the first time received notice of the resolution of the defendants in favour of the Bank of India. The plaintiff had the receipt passed in his favour by the defendants stamped as a charge on land and registered. On September 17th

the defendants were declared insolvent and Mr. R. D. Sethna was appointed liquidator. As such liquidator he was ordered to sell the mortgaged property and hold the sale proceeds subject to the amount due to the plaintiff. The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs. The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale proceeds for two lacs and interest and for payment of that sum. Mr. Justice Davar remarked "the main question in this suit is whether the plaintiff is entitled to a charge on the defendants' property, and to rank as a secured creditor, or merely to share rateably as an ordinary creditor of the defendant-Company.....I will discuss the question on the assumption that a valid charge was created in favour of the plaintiff. A close study of the authorities establish beyond all doubt that in law neither the want of a resolution nor the defect in the Board of Directorate can affect adversely the rights of third parties who have no knowledge of the existence of such infirmities. The authorities on the subject are both clear and conclusive. *E.g.* In the case of *Royal British Bank v. Turquand* where the deed of settlement of a Company provided that the directors might borrow on bonds such sums as should from time to time by a general resolution of the



Company be authorized to be borrowed, it was averred that there had been no such resolution authorizing the making of the bond in that case. Lord Campbell, in delivering the judgment, said "in this case the bond sued upon is allowed to be under the seal of the Company.....A *primâ facie* case therefore is made for the plaintiffs.....No illegality appears on the face of the bond or condition.....If no illegality is shown as against the party with whom the directors contract under the seal of the Company, excess of authority is a matter only between the directors and the shareholders." Again in *County of Gloucester Bank v. R. M. S. & H. Colliery Co.*, it appears that the Directors of that Company had power under their articles to fix the number of Directors which should form a quorum. By a resolution they fixed three as a quorum. A meeting of Directors, at which two only were present, authorized the Secretary to affix the Company's seal to a mortgage which was accordingly done by the Secretary in the presence of the same two directors. It was held that as between the Company and the mortgagees, who had no notice of the irregularity, the execution of the deed was valid, Lord Halsbury observing, in the course of his judgment, that persons dealing with Joint-Stock Companies were bound only to look at what one may call the outside position of the

Company.....On these authorities, having regard to the circumstances under which the sum of two lacs of rupees was advanced by the plaintiff, having regard also to the language of the document executed on that occasion and to the contents thereof and the terms and conditions mentioned therein, having regard also to the action of the parties subsequent to the execution of that agreement and the events that followed, I have no hesitation in holding that a valid, legal and binding further charge was created in favour of the plaintiff against the mortgaged property of the defendant Company for the two lacs of rupees advanced by the plaintiff on the 5th of August 1909, and there must be a decree in favour of the plaintiff as prayed by him in his plaint (1).

The question of government is thus a fundamental question so far as Companies are concerned. It determines the legal liabilities of juristic person known as a private Company. This as I have repeatedly pointed out is an important factor in determining the orbit of the jural capacity of a group person. It is, however, a preliminary consideration that leads to the other features of a private Company.

The modern companies are limited by shares. The statute law both in England and

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(1) I. L. R. 36 Bom., p. 564.

in India intends to form a comprehensive Code applicable to the joint stock trading companies. I may tell you before taking a general survey of the Indian companies that the earliest kind of Joint Stock Company is the Chartered Company. You remember that the name Joint Stock Company was originally used to distinguish such a Company from the regulated Company which did not trade on a joint stock but was in the nature of a trade guild the members of which had a monopoly of foreign trade with particular countries or places. The Chartered Companies were granted through their charters from the Crown the exclusive privilege of trading as corporate persons. One of the disadvantages of a Chartered Company was that a charter was not easily obtainable, and even when obtainable it was rather costly. Again from the standpoint of creditors the Chartered Company was unsatisfactory because the members were not personally liable for the debts of the Company to any extent and once created such a Company was invested with entire independence. These circumstances led to the formation of unlimited liability companies. These in turn proved unsatisfactory because in many cases unlimited liability meant ruin to the shareholder although they were not directly responsible for the management of the company. This led to the idea of limited liability companies.

In India it is with this last, that we have mostly to do. Let us discuss the feature of Indian Companies Act. I shall refer to the Act VI of 1882 because the general principles of Company law are, so far as India is concerned, fixed by that old Act although the recent Act has modified the law in some particulars. Moreover, the new Company Act has not had yet a fair trial and it will be several years before some of the points in the new legislation can be clearly understood.

If trading concerns are carried on by large and fluctuating bodies a person dealing with them will not know with whom he is contracting and who is to be sued when necessary. To remedy this defect the Act VI of 1882 says in §. 4. "No Company, Association, or Partnership, consisting of more than 10 persons, shall be formed for the purpose of carrying on the business of banking, unless it is registered as a Company under this Act, or is formed in pursuance of an Act of Parliament or some other Act of the Governor-General in Council, or by Royal Charter or Letter Patent; and no Company, Association or Partnership, consisting of more than 20 persons, shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the Company, Association, or Partnership, or by the individual members thereof, unless it is registered as a Company under this

Act, or of Letters Patent." The meaning of the Act is that all commercial undertakings as distinguished from literary or charitable associations should be registered. The Act after clearing the preliminary ground goes on to discuss the machinery for the formation of a Company under the Act. It says in § 6. "Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated Company, with or without limited liability." The Act explains that the foreigners are persons within the meaning of this section, although the whole or any part of the business of the proposed Company is intended to be transacted out of British India. As is evident from the section quoted that it is not necessary that the subscribers should be traders. Even "the fact that six of the subscribers are mere dummies or nominees of the seventh will not affect the validity of the Company." You remember that in *Salomon v. Saloman & Co.* it was decided that a One-man Company was recognized by the English Act. The principle of that decision is fully applicable to India.

The important documents which according to the Indian Act determine the legal capacity of the Companies are the memorandum of association and the articles of association.

The memorandum of association corresponds in the case of Companies under the Companies Act to the charter or deed of settlement in the case of other Companies. It may be noticed in this connection that the memorandum of association is an essential ingredient while the articles of association are not necessarily so. Because the Act says in § 37, that the memorandum of association *may*, in the case of a Company limited by shares, and *shall*, in the case of a Company limited by guarantee or unlimited, be accompanied, when registered, by articles of association. The optative form in the case of Companies limited by shares plainly shows that the articles of association do not form a constituent feature of all Companies.

The form of the memorandum varies according as the Company is limited by shares or guarantee or is unlimited. In the case of a Company limited by shares the memorandum of association shall contain (a) the name of the proposed Company with the addition of the word "limited" as the last word in such name ; (b) the part of British India in which the registered office of the Company is proposed to be situated ; (c) the object for which the proposed Company is to be established ; (d) a declaration that the liability of the members is limited ; (e) the amount of capital with which the Company proposes to be registered divided

into shares of a certain fixed amount. No subscriber is allowed to take less than one share ; and each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

The legislature considers these five matters to be the essential conditions of incorporations. Their importance is so great that with certain exceptions they are unalterable. I may draw your attention to the third of the above five conditions as it is one connected with the *ultra vires* doctrine already discussed. If any act is done which is beyond the sphere of the Company's activity as marked out by the objects proposed, the act is absolutely null and avoid. The reason as I have told you in the lecture immediately preceding is that the shareholders contribute their money on the faith that it is to be employed in prosecuting certain objects and it would be a violation of good faith if the Company were allowed to divert it to something quite different.

The articles of association are meant to regulate the internal management of the Company. A model of articles is shown by the table A of the first schedule of Act VI of 1882. The Company may adopt all or any of the provisions contained therein. The Act says that the articles shall, in the case of a Company, whether limited by a guarantee or unlimited, that has a capital divided into

shares, state the amount of capital with which the Company proposes to be registered, and in the case of a Company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the Company proposes to be registered for the purpose of enabling the Registrar to determine the fees payable on registration.

The next point is that about the capital. The capital which is required to be stated in the memorandum of association and which represents the amount which the Company is empowered to issue is called the nominal capital. It must be distinguished from the subscribed capital; the latter is the aggregate amount agreed to be paid by those who have taken shares in the Company sometimes a minimum subscription may be fixed by the articles and if it is fixed the directors cannot go to allotment on less, if it is not fixed then the whole of the capital offered for subscription must be subscribed. A Company may increase its capital, consolidate, subdivide it into shares of smaller amount and convert paid up shares into stock. It cannot, however, reduce its capital either by direct or indirect means without the sanction of the Court. "The inviolability of the capital is a condition of incorporation—the price of the privilege of trading with limited liability, and by no



subterfuge will a Company be allowed to evade this cardinal rule of policy, either by paying dividends out of capital, or buying its own shares, or returning money to shareholders. But the prohibition against reduction means that the capital must not be reduced by the voluntary act of the Company, not that a Company's capital must be kept intact. It is embarked in the Company's business, and it must run the risks of such business. If part of it is lost there is no obligation on the Company to replace it and to cease paying dividends until such lost capital is repaid. The Company may in such a case wipe off the lost capital and go on trading with the reduced amount. But for this purpose the sanction of the Court must be obtained by petition." (1)

As most of the modern Companies are limited by shares the statute determining the rights and duties of these group persons carefully distinguish the shares from the capital of a Company's nominal capital. The amount may be anything from one rupee to one thousand rupees. In England the most common amount is either £ 1 or £ 5. Shares may be ordinary, preference, deferred, founders, or management. The nature of the shares and the amount depend on the special circumstances attending the creation of a Company. In

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(1) Act VI of 1882, § 15, E. Manson—Law of Trading Companies.

general a Company may issue preference shares even if there is no mention of them in the memorandum of Association. Thus according to the English Companies Act "any preference or special privilege given to a class of shares cannot be interfered with on any reorganization of capital except by a resolution passed by a majority of shareholders of that class representing three-fourths of the capital of that class." The preference as Manson has pointed out may be given with regard to dividends only or to dividends and capital. Preference shareholders are given by the statute the right to inspect balance sheets. Founder's shares are those that give the shareholders the right to take the whole or half the profits after payment of a dividend of 7 or 10 per cent. to the ordinary shareholders.

Sometimes questions arise with reference to the position of the promoter of a Company in the Company promoted by him. The promoter according to Cockburn, C. J., is a person "who undertakes to form a Company and to set it going and who takes the necessary steps to accomplish that purpose." Whether a given individual is a promoter or not depends on questions of fact. Once, however, it is clearly settled that a person is a promoter he is regarded as a trustee or agent for the purpose of settling the obligations involved. Because a promoter has in his hands the

creation and moulding of the Company, the power of defining how and when and in what shape and under what supervision it shall start into existence and begin to act as a trading corporation, he must not take advantage of the Company's helplessness (1). "A promoter may sell his property to the Company but he must first see that the Company is furnished with an independent board of directors to protect its interests and he must make full and fair disclosure of his interest in order that the Company may determine whether it will or will not authorize the promoter to make a profit out of the sale. It is not a sufficient disclosure in such a case for the promoter merely to refer in the prospectus to a contract which, if read by the shareholders, would inform them of his interest. They are under no obligation to enquire. It is for the promoter to bring home notice, not constructive but actual, to the shareholders." (2)

A topic of importance in Company Law is that regarding the prospectus of a Company. At one time the prospectus was regarded as the usual mode of inviting the public to subscribe for shares. At present the statutes both English and Indian do not, however, insist on the issuing of a prospectus, but they require all the material facts relating to the Company

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(1) *Erlanger v. New Sombrero Phosphate Company*, 3 A. C. 1239.

(2) *The Encyclopædia Britannica*, 11th Edition, Vol. VI, p. 797.

to be published if a prospectus is not issued. A prospectus is an invitation to the public to take shares on the faith of the statements therein contained and consequently is the basis of the agreement to take shares. Thus the obligations created by the prospectus are governed by the doctrine of *uberrima Fides*. The directors must be perfectly candid with the public. "They must not only state what they do state with strict and scrupulous accuracy, but they must not omit any fact which if disclosed, would falsify the statements made." One may refer to the famous cases of *New Brunswick Railway Co. v. Muggeridge*, and *Derry v. Peek* for the discussion of principles governing the liability of directors for an untrue statement in the prospectus of a proposed Company. These cases are so well known that it is not necessary to stop here for recapitulating what is perhaps known to you all.

The allotment of shares especially in a Company limited by shares is an important transaction. According to the English Companies Act, 1908 a Company cannot commence business or make any binding contract or exercise any borrowing powers until it has obtained a certificate entitling it to commence business. To obtain this certificate the Company must have allotted shares to the amount of not less than the minimum subscription,

every director must have paid up his shares in the same proportion as the other members of the Company, a statutory declaration, made by the secretary of the Company or one of the directors, must have been filed with the Registrar of Joint-stock Companies, that these conditions have been complied with. According to the Act VI of 1882 (The Indian Companies Act) a Company may have some shares fully paid and others not fully paid. The manner in which shares are to be issued and held is indicated by § 28 of this Act. According to this section "Every share in any Company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same has been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint-stock Companies at or before the issue of such shares."

A shareholder becomes, of course, a member of the Company. A question may naturally be asked as to whether the final allotment of a share may be subject to a condition precedent named by the applicant, and if so what would be the position of the applicant till the condition is fulfilled. According to the decision in *Mahendra Gopal Mukerji v. Lachman Prasad* and another the applicant for a share to the allotment of which a condition precedent is attached, is a creditor and not a member

of the corporation till the condition is fulfilled. Here a company was started in Meerut in 1904 with the object of a very general nature. In 1906 the Company proposed to erect a mill at Fyzabad and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one M applied for shares but added to his application a condition to the following effect. "These shares are subscribed only on condition that any mill is started in the suburbs of Fyzabad." The Company, however, found that they could not raise the necessary funds to start a mill at Fyzabad and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the Company went into liquidation. It was remarked in the course of the judgment that facts of the case and the subsequent conduct of the Company itself showed that "it was clearly understood by the present appellant and the Company that it was a condition precedent that a branch mill should be started at Fyzabad or its suburbs. If it had been otherwise, there would have been no necessity for the Company to pass the resolution of the 27th of September, 1909. It appears that the Company wished to raise funds locally and the person living in Fyzabad were willing to subscribe provided that a mill was started

there." It has been admitted that if the condition is a condition precedent the appellant is entitled to succeed. "In view of the facts in the case we have no hesitation in saying that the condition was a condition precedent. The appellant is not a member of the company, but apparently is a creditor and entitled to get back what he has already paid." (1)

An agreement for shares is governed by the ordinary rules of contract. The offer in the case of shares is generally in the form of an application in writing to the Company, made in response to a prospectus requesting the Company to allot the applicant a certain number of shares on terms of the prospectus. According to the English Companies Act, 1908 an allottee is entitled to rescind his contract where the allotment is irregular. An allotment is the usual evidence of acceptance. As soon as the allotment is posted the contract is complete, even though the letter never reaches the applicant. It is the duty of the Company, when the contract is complete, to enter the shareholder's name in the register of members and to issue to him a certificate under the seal of the Company. Such a certificate is the evidence of the shareholder's title to the shares. The register of members consequently is an important document.

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(1) 1. L. R. 35 All., p. 538.

According to the Indian Companies Act, 1882 every Company is required to keep in one or more books a register of its members. The register should contain the following particulars:—(a) The names and addresses and the occupations, if any, of the members of the Company, with the addition, in the case of a Company having a capital divided into shares, of a statement of the shares held by each member, distinguishing each share by its number and the amount paid, or agreed to be considered as paid, on the shares of each member (b). The date at which the name of any person was entered in the register as a member (c). The date at which any person ceased to be a member. The importance of the register is seen from the fact that the principle of limited liability requires that the limitation of liability should be brought home by every possible means to persons dealing with the Company as well as that such persons should know as far as possible what was the limited capital which was the sole fund available to satisfy their claims. They should know “what amount had been called up, what remained uncalled, who were the persons to pay, and in what amounts. These data might materially assist a person dealing with the Company in determining whether he would give it credit or not; in any case they are matters which the public had a right to



know " (1). The legislature has consequently demanded the keeping of a register with all necessary particulars in it so that the public may inspect it at all reasonable times. In order that the register may be accurate and correspond to the true liability of membership for the time being the court is authorized to order the entry or removal of the name of a person when necessary. Another security against the abuse of limited liability is maintained by the rule that requires the shares in the case of a limited Company to be paid for in full. The legislature has allowed such Companies to trade with limited liability, but the price of the privilege is that the limited capital to which alone the creditors can look shall at least be a reality. That is why it is *ultra vires* for a limited Company to issue its shares at a discount. The Section 47 of the Indian Companies Act, 1882 has indicated certain measures for further safety of the public. An important question arose in the New Flemming Spinning and Weaving Company, Ltd., in liquidation connected with the topic under discussion. The articles of association of the Company authorized the directors to raise or borrow from time to time in the name or otherwise on behalf of the Company such sums of money as they from time to time think expedient, either by way of

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(1) Encyclopædia Brit. l. c., p. 799.

sale or mortgage of the whole or any part of the property of the company or by bonds, debentures, or promisory notes or in such other manner as they deem best and for the purpose of securing the re-payment of any money so borrowed with interest to make and carry into effect any arrangement which they may deem expedient by conveying or assigning any property of the company to trustees or otherwise." Now the matter for decision was whether the exercise of such powers as contemplated in the articles of association through an instrumentality not specified in the rule was *ultra vires* and as such affected the principle of limited liability as understood by the statute. It was held that an instrumentality not specified in the articles but analogous to the means indicated definitely might do. But the still more important question was whether such an instrument was binding on the company. In this case the money was raised by a bill of exchange. The Section 47 of the Indian Companies Act, 1866 provided as follows "a provote, bill of exchange or hundi shall be deemed to have been made, accepted or endorsed on behalf of any company under this Act if made accepted or endorsed in the name of the Company by any person acting under the authority of the Company or if made accepted or endorsed by or on behalf or on account of the Company by any person acting under the authority of

the Company. The decision kept in view the fact that all transactions authorised by the Companies Act must not violate the fundamental principle of limited liability. Although the doctrine of agency plays an important part so far as one of the reasons for decision is concerned yet that doctrine is discussed here in connection with the principle that does not allow the shares to be paid "in meal or in malt." Every share carries with it the liability to pay up the full amount in cash or its equivalent. The liability is limited but not illusory.

As all dealings with a company are dominated by the fundamental rules of common law coupled with the statutory limitations it goes without saying that a fraud or a misrepresentation has the same effect on a contract with a company as on that with an individual. Hence a company can not keep a contract obtained by the mis-representation or fraud of its agent. In fact the statutory liability the directors especially in England has carried the common law liability a step further. In the case of a mis-representation, however, innocent, made by the directors the contract with the company may be rescinded and action may be brought by the share holder against the directors under the Directors Liability Act, 1890.

The next question deserving attention is the one concerning the transfer of shares in a

joint-stock company. The shares or other interest of any member in a company are personally and may be transferred in the manner provided by the regulations of the company. Lord Blackburn remarked "one of the chief objects when joint-stock companies were established was that the shares should be capable of being easily transferred; but though every shareholder has a *prima facie* right to transfer his shares, this right is subject to the regulations of the company and the company may and usually does by its regulations require that a transfer shall receive the approval of the board of directors before being registered,—the object being to secure the company against having an insolvent or undesirable shareholder substituted for a solvent and acceptable one. This power of the directors to refuse a transfer must not, however, be exercised arbitrarily or capriciously. If it were, it would amount to a confiscation of the shares.

The rules regarding the distribution of dividends and the examination of the account of a company are safeguards against unnecessary waste or mis-use of company's property. They may be said to have an indirect bearing on the liability of the members. A company can only pay dividends out of profits. Dividends are "earnings of a concern after deducting the expenses of earning them." To pay dividends out of capital is not only *ultra vires*

but illegal, as constituting a return of capital to shareholders. Directors are required to take reasonable care to secure the preparation of proper balance sheets and estimates, and as businessman they should exercise their judgment on the balance sheets and estimates prepared for inspection. If they fail to do this and pay dividends out of capital they are held liable unless the court think otherwise. The court as a rule does not interfere with the discretion of directors unless they have been guilty of an *ultra vires* act. The object of this rule is the maintenance of the capital in its integrity so as to minimise the chances of failure as much as possible. A further guarantee against undue waste of the company's property, stock and capital, is secured by the stringent provisions for the appointment and remuneration of auditors by a company. In the English Companies Act, 1907 the rights and duties of the auditors are definitely indicated. The necessity for such provisions is well illustrated by a recent English Case (1). There the secretary of a company having been guilty of defalcations by which loss was occasioned to the company the directors alleged that the company's auditors had by negligence in the performance of their duties conducted to these defalcations and refused to give them access to the com-

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(1) *Cuff v. London and Country Land and Building Co., Ltd.*, Ch. (1912), p. 440.

pany's books for the purposes of audit. The auditors thereupon brought an action, against the company and the directors, claiming a declaration that they as auditors were entitled at all times to access the company's books and an order for access thereto. The time having arrived when in the ordinary course the audit of the company's account by the plaintiffs should be proceeding for the purposes of the next annual general meeting, the plaintiffs made an interlocutory application in the action for an order that the defendants should give them access to the books and Eve., J., made a mandatory order to that effect on the ground that the auditors had a statutory right of access to the books. On appeal the court held that it was a question for the judicial discretion of the court whether the right of access to the books claimed by the plaintiffs should be enforced by a mandatory order and that such an order ought not, under the circumstances of the case, to have been made upon an interlocutory application and without any steps to ascertain whether the company were desirous that the plaintiffs should continue to act as auditors or not and therefore the appeal must be allowed.

The auditors put their claims on the grounds of their duty to protect the rights of the company and the contention on their behalf goes to this astounding extent : that although

an auditor be a convicted felon his right is statutory and cannot by any possibility be taken away from him. It may or may not be so. As at present advised it is one thing to say that a man has a statutory right and it is quite another thing to say that the court in the exercise of its judicial discretion is bound to grant a mandatory injunction in order to give effect to such right. It is perfectly clear in my opinion that the court is not bound to do anything of the sort. In all cases of this nature which are matters relating to the internal management of the company it has always been the practice of the court to direct a meeting of the shareholders to be convoked in order to see what their wishes are. I cannot assent to the contention of the plaintiff's counsel as to the supreme position of the auditors. They are servants of the company appointed by the company and if the shareholder did not desire them to act no court would by mandatory injunction force them upon the company. If the company chooses to say in general meeting that having regard to the non-inspection of their books during all these years they do not wish that the plaintiffs should act as auditors any more, I cannot see how any court can possibly compel by way of injunction specific performance of the contract of service of the auditors. In truth §112 of the Companies Act, 1908 (*English*) makes the company the appointer

of the auditors. By that section the company have a duty imposed upon them to appoint an auditor or auditors to hold office till the next annual general meeting. *Primâ facie* that is their appointment; and if the auditors are dismissed before the expiration of their term of office they have the usual right of action for wrongful dismissal. It may be that there is an answer justifying the dismissal. But whether that be so or not, to say that they can and that this court will assist them to force their services upon a Company which does not wish for them seems to me to be extravagant. It was held in *Bainbridge v. Smith*, (41 Ch. D. 462) in the case of a director who was entitled to act as such by contract on the purchase by a Company of the property of brewery company that although the director was so entitled yet in as much as the company when assembled at a meeting called by direction of the court for that special purpose, said they did not wish him to act as director the Court would not interfere to force him on the company. In the same way the court would not force, on an unwilling company, auditors whom they do not approve. I have no difficulty about § 113. Its provisions refer to the auditor acting as such and are incident to his exercise of his duties. If he has been dismissed whether rightly or wrongly and excluded *viêt armis* by the company nobody can make him respon-



sible for not having made out a report or made out accounts which he cannot physically do. In my opinion there is no ground for interfering in this summary way to thrust their auditor upon the company and make the company produce to them all their books, not merely for the purpose of the company but for auditors own purposes.

You see that the judge lays here a great stress on the relation between a company and its auditors to indicate clearly that the rights and duties of the auditors are defined by the statute mainly for the purpose of safeguarding the interests of the company. All along the legislature has been aiming at the maintenance of the principle of limited liability of the shareholders. Before discussing the Indian statutory rules regarding this principle it may be of some interest to consider how foreign systems have dealt with that fundamental question in connection with companies public and private. I shall take a few examples from the American and the continental laws touching on the legal relations between the shareholders and the corporation.

The shareholder as has already been noticed is brought into a legal relation with the group body by purchasing, subscribing for or contracting to take shares of stock. As soon as one or other of these juristic acts has been performed the rules of law governing the

corporate body come into operation in order to fix not only the relative positions of the shareholder and the body corporate but also those of all persons interested in the corporate enterprise. The forms of contract to take shares in the stock of a corporation may differ but the legal relations established are always similar. The reason for this uniformity in the consequence of special kinds of juristic acts is that the acts concerned refer to the establishment of a generic result. Thus Lord Lindley has observed that "the type of a member or shareholder of a company is a person who has agreed to become a member, and with regard to whom all conditions precedent to the acquisition of the rights of a member have been duly observed." (1)

The preliminaries, therefore, might differ but the ultimate result is always the same. The finished type bears no marks of original peculiarities. The contract is in the main a contract to subscribe funds for the accomplishment of a certain purpose, the subscriber to surrender his rights as owner over the funds subscribed, but to retain some of his rights in such funds. He can compel the application of such funds to no other purposes than the objects of incorporation. This follows from the general principles of corporation law. In an American case it was remarked "when any person takes

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(1) Lindley—On Partnership, p. 127.

stock in a railroad company, he has entered into a contract with the company that his interest shall be subject to the direction and control of the proper authorities of the corporation to accomplish the object for which the company was organized. He does not agree that the improvement to which he subscribes should be changed in its purposes and character, at the will and pleasure of a majority of the stockholders, so that new responsibilities and it may be new hazards, are added to the original undertaking." (1)

The legal relations between a company and its shareholders are the manifestations of the rules of law within the operation of which the parties by their contract have brought themselves. These relations will then be defined by the charter of incorporation or by the general enabling statute and articles of association filed in accordance therewith, supplemented by the more general rules of corporation law. In *New Hampshire Central R. R. Company v. Johnson* the law on this point was stated as follows:—"where a party makes an express promise to pay the assessments, he is answerable to the corporation upon such promise for all legal assesment, and may be compelled to its performance by an action at law, before resorting to a sale of the shares. It is a personal undertaking beyond the terms

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(1) *Clearwater v. Meredith*, 1 Wall, 25, 40.

of the charter. Where, on the otherhand, he only agrees to take a specified member of shares, without promising expressly to pay assessments, then resort must first be had to a sale of the shares to pay the assessments before an action at law can be maintained. His agreement simply to take the shares is an agreement upon the faith of the charter and by it alone is he to be governed, so far as his shares are to be affected. He takes them upon the conditions and law of the charter. They exist only by virtue of the charter and are to be governed by the provision therein contained." (1) Of course, in absence of express provisions the ordinary rules of contract will determine the liability or otherwise of the shareholders in case of demands not specifically mentioned in the prospectus. The fundamental doctrine of consideration will be sufficient in the majority of cases to determine the existence of contractual liability. When no consideration is expressed a sufficient one is implied through accepting the subscription of a shareholder or admitting the subscriber to all the rights of a shareholder. Again if the contract to subscribe is conditioned on the subscription of a certain amount, it may not be enforced until that amount is subscribed for; and if a certain amount of stock is mentioned in the charter or articles of Association, a contract to

(1) 30 N. H. 390, 403.

subscribe is impliedly conditioned on the subscription of that amount unless the terms of the subscription contract or of the statute under which the corporation is organized are inconsistent with the existence of such implied conditions.(1)

Sometimes it is difficult to determine whether a given provision in the constitution of the Corporation or in the subscription contract constitutes a condition precedent to the enforcement of the subscription, of course the non-fulfilment of that which is not a condition is no defence to an action for calls. Thus in an American case where a company in its prospectus set forth an intention to purchase ten tracts of land, and afterwards failed to purchase two of them, on account of a defective title, it was held that the plaintiff could not on that account rescind his contract to purchase shares, as to permit that would be a great hardship on the other shareholders. If injury had resulted there might be an abatement in the shape of damages, but not an entire release. The basis of this decision was the fact that the exact number ten did not form a true condition precedent.(2)

The effect of fraud on a contract to purchase shares is determined by the general rule

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(1) *Jowa and Minn R. R. Co. v. Perkins*, 28 Iowa, 281. See also Taylor, *loc. cit.*, § 518, Foot Note.

(2) *Kelsey v. N. L. Oil Co.*, 45 N. Y. 505.

that a fraud makes a contract voidable. It is not necessary to go into details regarding this matter as the subject is fully dealt with in any book on the law of contracts. But it may be interesting to note that there is a shade of difference between the English and American views regarding the question of annulling subscriptions on the ground of the fraud of corporate agents. In England a tendency has been shown to regard a contract of subscription as a contract strictly between the subscriber and the company. Thus in *Directors v. Kisch* the court held that a person could dissolve a contract to take shares in a company when the inducement on its part was false, and when not himself guilty of laches, could withdraw without regard apparently to the subsequently accruing rights of creditors. Lord Ramilly said "that contracts of this description between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals"(1). The American cases recognise, on the otherhand, that a subscription contract is one on which persons other than the contracting parties are entitled to rely.

Taylor suggests that to questions regarding the right to rescind a subscription contract or

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(1) L. R. 2 H. L. 99.

defend in a suit for calls reasoning like the following is applicable. "In all matter within the ordinary scope of the corporate powers, the corporation acting through whatever agency make constitute the corporate management represents all persons in any way interested in the corporate enterprise. Consequently the interests of all are bound by the Acts of the corporate management (say, for simplicity, by the acts of the board of directors) within the scope of its authority. But the board in no way represents persons whose interests in respect of the corporate enterprise have not yet arisen. When A, for instance, contracts with the directors, the latter represent the persons whose interests have already accrued, *i.e.*, shareholders and existing creditors. But A, until his rights have arisen, is as to the directors an outsider, whom they in no way represent. If, in contracting with A, the directors act fraudulently, then on account of the fraud he would be allowed as between himself and those whom the directors represent, to rescind the contract, because the fraud of the agent is the fraud of the principal, and is in this case, as to A, the fraud of the corporation, and of the persons already interested in it, whom the directors represent. Moreover, within the scope of their more restricted powers, other agents, as we as directors represent the entire mass of corporate interests. Applying this

reasoning to the right of a subscriber to annul a subscription contract induced by a fraud of the agent representing the corporation in the matter, it would seem that the contract might be annulled by the subscriber acting swiftly, unless, after his subscription and before he has taken steps to annul it, some one has acted relying on it in good faith; that is, unless some one has subscribed subsequently, seeing on the books the name of the subscriber whose subscription was induced by fraud, or some one has contracted with the corporation on the credit of such fraudulently induced subscription. As to such latter persons, it would seem that the subscriber could not rescind so as to prejudice their rights in any way, for the corporate agent in his fraudulent contract with the subscriber in no way represented such persons, who afterwards acted relying on the acts of the subscriber. And if the subscription was induced by fraud, nevertheless the loss should fall on the subscriber rather than on persons who acted subsequently relying on his subscription. For the directors, when they afterwards contract with any one, represent the subscriber, and to allow him to rescind so as to affect the rights of a subsequently contracting party might visit on an innocent head the results of a fraud committed by the corporate agent on a person whom at the time of the subsequent contract the directors represent and who, there-



fore, should bear the loss rather than the parties subsequently contracting.”(1)

A question of importance frequently arises in connection with changes in the corporate enterprise by legislative action. Although there are no Indian decisions regarding the effect of a legislative change on the relation between a company and its shareholders yet it may not be amiss to take the views of English and American authority as throwing light on this important question. It is necessary, however, to bear in mind that there is some conflict of authority in regard to the point under consideration. According to some of the American decisions if the change in the constitution is immaterial or if the alteration is in the main conducive to the successful carrying out of the originally contemplated enterprise a shareholder is not released. On the otherhand a great number of cases hold that an alteration of the constitution effecting a radical change in the corporate enterprise releases a shareholder from his subscription. These cases proceed on the theory that the corporation cannot enforce the subscription of a dissenting shareholder while the constitution as altered remains in force ; since that would be to enforce a contract which the shareholder never made. Taylor thinks, that many of these decisions are wrong on principle. For it is a recognised rule

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(1) Taylor, *loc. cit.*, § 529.

that a charter imports a contract between the corporation and the state and consequently any change in the constitution made by the state and unaccepted by the corporation would be unconstitutional and void. But the corporation or majority of shareholders has no power to bind the minority by acts beyond the scope of the corporate powers contemplated by the original constitution and with greater reason "no authority to bind them by any act causing a radical change in the corporate enterprise, *e.g.*, by accepting a radical amendment to the corporate constitution. Therefore the state having no power to amend the constitution against the consent of the corporation and the corporation having no power to accept an amendment against the consent of any shareholder it would seem that no shareholder should be allowed to claim a release as long as there are other non-consenting shareholders who do not wish to be released but desire to have the original corporate enterprise adhered to." (1)

When a power is reserved by the state to alter radically the constitution of a corporation, unless the change could be held to have been contemplated by the subscriber on

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(1) Taylor, *loc. cit.*, § 532. Fry's Ex'r v. Lexington, &c., R. R. Co. 2 Metc. (Kej) 314. Mississippi, &c., R. R. Co. v. Cross, 20 Ark. 443. Mississippi, &c., R. R. Co. v. Gaster 24 Ark. 96. For a dissenting view, see Thompson v. Guion 5 Jones Eq. (N. C.) 113.

subscribing, such altered contract the result of a change effected by the state could not be enforced against such a subscriber, because a state cannot make a contract between its citizens. The change, however, must be radical, *e.g.*, it has been held in New York that an alteration by the legislature of the charter of a plank road or railroad corporation, in pursuance of powers reserved, by changing its name, increasing its capital, and extending its road, does not discharge a subscriber from liability on his subscription (1). In the case of an immaterial change it was remarked "the change is not fundamental. The new powers conferred are identical in kind with those originally given. They are enlarged merely, the general objects and purposes of the corporation remaining still the same. It may be admitted that under this reserved power to alter and repeal, the legislature would have no right to change the fundamental character of the corporation and convert it into a different legal being, for instance, a banking corporation, without absolving those who did not choose to be bound." (2)

In another case where the alteration consisted of a considerable addition to the length of the railroad contemplated in the

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(1) *Schenectady, &c. Plank Road Co. v. Thatcher* 11 N. Y. 102  
*Buffals and N. Y. City R. R. Co. v. Dudley* 14 N. Y. 336.

(2) 14 N. Y. 348.

charter a shareholder wanted to maintain a bill in equity to restrain the corporation from engaging in the new enterprise. Chief Justice Bigelow said "whatever may be the authority which is retained by the legislature to modify or change the charters of corporations without or against their consent, there would seem to be no reason to doubt that, with the concurrence of the corporation manifested in the mode pointed out by law, the legislature may make any alteration in, or addition to the power and authority conferred by the original act of incorporation and not foreign to the purposes and objects for which it was enacted, and which it was designed to accomplish, which may seem to be expedient or necessary. No breach of contract would be thereby occasioned. Such action would be in precise accordance with the terms on which the grant of the franchise was made. The stock holder cannot say that he became a member of the corporation on the faith of an agreement made by the legislature with the corporation, that the original act of incorporation should undergo no change, except with his assent. The real contract into which the stockholder enters is, that he agrees to become a member of an artificial body which is created and has its existence by virtue of a contract with the legislature, which may be amended or changed with the consent of the Company, ascertained

or declared in the mode pointed out by law. All that we mean to determine is that the obligation of the contract which subsists between the corporation and a stockholder, by virtue of his being a proprietor of shares in the corporate stock is not impaired by an act of the legislature which amends and alters the charter, and authorizes the corporation to undertake new and additional enterprises of a nature similar to those embraced within the original grant of power, if such act is accepted by a majority of the stockholders in the mode provided by law." (1)

In the case of *Zabriskie v. Hackensack, &c. R. R. Co.* the chancellor Zabriskie took a different view. He remarked that the legislature could repeal or suspend a charter of incorporation, it could alter or modify it but it could not impose a new one and oblige the stock holders to accept it. It has, however, been suggested that this view is not easy to follow, because if the legislature can alter or amend or impose new terms it is plain that it has the power to make the alteration subject to the will of a majority of the shareholders. Surely what it can do without the assent of this majority it can do with it. (2)

The next question so far as the relation between a Company and its shareholders is

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(1) *Durfee v. Old Colony, &c., R. R. Co.* 5 Allen, 230, 243.

(2) 18 N. J. Eq. 178. See also *Bish v. Johnson*, 21 Ind. 299.

is concerned refers to matters bearing on the insolvency of a corporation. Is the insolvency of a corporation a defence to a suit brought to collect a subscription? The accepted view is that insolvency is no defence. The assignee or receiver of the corporation succeeds to all its right and may recover unpaid subscriptions for the benefit of shareholders and creditors. This rule is universally prevalent and follows from the theory of juridical personality. The receiver consistently with the doctrine of legal capacity cannot enforce the payment of a subscription which the corporation could not have enforced at the time of his appointment for the corporation just as much as its receiver represents the interest of all persons, creditors as well as shareholders, the main difference being that as a receiver is ordinarily appointed when the Company is about to be liquidated the rights of the creditors in the Company's funds are then especially prominent, and a receiver is more apt to be regarded as he represents not only the corporation but also creditors and shareholders and in his character of trustee for the latter may disaffirm illegal and fraudulent transfers of corporate property, and recover its funds and securities misapplied. "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken on execution may, if equit-

able, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the Court and of all the parties in interest in the litigation wherein he is appointed." (1)

Another topic of frequent occurrence is the forfeiture of shares for non-payment of calls. The corporation or the Corporate management may forfeit shares for non-payment of calls when power to do so is given by the constitution of the corporation but the power to forfeit like the power to manage all the affairs of the corporation, is vested in the directors of a Company upon the assumption that they will exercise it in the best manner practicable for the promotion of the interest of the Company and its creditors, that they will not forfeit the stock unless the interest of all will be promoted thereby. Should they forfeit it for the purpose of defrauding the corporation or any creditor, such forfeiture would for that reason be set aside. Collusive forfeitures cannot be allowed. (2)

Sometimes the question arises as to the validity of the release or withdrawal of a shareholder. According to the general principles of corporation law it is incompetent

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(1) *Davis v. Gray*, 16 Wall. 203, 218. *Taylor, loc. cit.*, § 542.

(2) *Mills v. Stewart*, 41 N. Y. 384, 390. *Richmond's Case* 4 Kay & J. 305, 323; *Gower's Case* L. R. 6 Eq. 77; *In re St. Marylebone Banking Co.*; *Stanhopes Case*, 3 De G. & Sm. 198.

for the directors or the body corporate to permit the holder of partially paid up shares, or shares to the ownership of which individual liability attaches, to withdraw in anyway not authorized by the constitution of the Company. Such permission is plainly ultra vires and will ordinarily affect the rights only of those assenting to it. (1) Here I may refer you to the leading English case of *Spaekman v. Evans*. The directors of a Company granted to a dissenting shareholder leave to retire from the Company on conditions which they deemed prudent and advantageous to be granted in his case but which were not in accordance with the deed of settlement. The shareholder performed the conditions, his name was for years removed from the list of shareholders, the Company changed its business without his knowledge and dividends were received in which he did not participate. Nevertheless it was held that his name should be inserted in the list of contributories on the final winding up of the Company. (2) So in an American case where for the purpose of increasing the capital stock of the corporation to the amount required by law, in order that the corporation might pass the examination

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(1) *Mann v. Cook* 20. Conn. 178, 188. *Whitaken v. Grummond* 68. Mich. 249.

(2) L. R. 3 H. L. 178. Note *St. Leonard & Romilly, L. J.*, dissented, See L. R. 5, Ch. 79 *Dikon's case*.



of the Commissioners appointed by the Comptroller, a premium note was given upon an agreement that after the examination the note might be withdrawn and a lesser one substituted. It was held that the agreement was a fraud and that the maker of the note continued liable thereon, although it had been withdrawn and destroyed. (1) Sometimes, however, a Company is allowed to vary its articles of association by a special resolution so as to give itself the power to accept surrender of old shares in exchange for new. (2)

The present topic may fitly be brought to a close by a general review of the power of a corporation to issue preferred shares. One cannot do better than cite in full the opinion of Judge Falgar in *Kent v. Quicksilver Mining Co.*: "we know nothing in the constitution or the law that inhibits a Corporation from beginning its corporate action by classifying the shares in its capital stock with peculiar privileges to one share over another, and thus offering its stock to the public for subscription thereto. No rights are got until a subscription is made. Each subscriber would know for what class of stock he put down his name and what right he got when he thus became a stockholder. There need be no deception or

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(1) *Tuckerman v. Brown*, 33 N. Y. 297.

(2) *Teasdale's case*, L. R. 9, Ch. 54.

mistake ; there would be no trenching upon rights previously acquired ; no contract ; express or implied, would be broken or impaired. This corporation did otherwise. A bye law was duly made which declared the whole value of its property and the whole amount of its capital stock, and divided the whole of it into shares equally in amount and directed the issuing of certificates of stock therefor. It is not to be said this bye law authorized anything but shares equal in value and in right ; or that the taken of one did not own as large an interest in the corporation, its capital, affairs and profits to come, as any other holder of a share. Certificates of stock were issued under this bye-law that gave no expression of anything different from that. When that bye-law was adopted, it was as much the law of the corporation as if its provision had been apart of the charter. (*Presbyterian Church v. City of New York*). So it is said in *Grant on Corporations*, p. 80, in a qualified way. Thereby, and by the certificate, as between it and every stockholder the capital stock of the Company was fixed in amount, in the number of shares into which it was divisible, and in the peculiar and relative value of each share. The bye-law entered into the compact between the Corporation and every taken of a share ; it was in the nature of a contract between them. The holding and owning of a share

gave a right which could not be divested without the assent of the holder and owner ; or unless the power so to do had been reserved in some way. (*Mech. Bank v. New York and IV. N. R. R. Co.* N. Y. 599.) Shares of stock are in the nature of choses in action, and give the holder a fixed right in the division of the profits or earnings of a Company so long as it exists, and of its effects when it is dissolved. That right is as inviolable as is any in property, and can no more be taken away or lessened against the will of the owner than can any other right, unless power is reserved in the first instance, when it enters into the constitution of the right ; or is properly derived afterwards from a superior law given. The certificate of stock is the muniment of the shareholder's title and evidence of his right. It expresses the contract between the Corporation and his co-stockholders and himself ; and that contract cannot, he being unwilling, be taken away from him or changed as to him without his prior dereliction, or under the conditions above stated. Now it is manifest that any action of a Corporation which takes hold of the shares of its capital stock already sold and in the hands of lawful owners, and divides them into two classes ; one of which is thereby given prior right to a receipt of a fixed sum from the earnings before the other may have any receipt therefrom, and is given an equal

share afterwards with the other in what earnings may remain, destroys the equality of the shares, takes away a right which originally existed in it and materially varies the effect of the certificate of stock.

It is said that when a Corporation can lawfully buy property or get money on loan, any known Assurance may be exacted and given, which does not fall within the prohibition express or implied of some statute and that is sought to be applied here. But the prohibition to such action as this is found, not indeed in a statute commonly so called but in the constitutional provision which forbids the impairment of vested rights, save for public purposes and on due compensation. The right which a stock holder gets on the purchase of his share and the issue to him of the certificate therefor is such a vested right.

It is contended that the power so to do is an incidental and implied power necessary to the use of the other powers of the Corporation and is a legitimate means of raising money and securing the agreed consideration therefor. We have already conceded that it is legitimate to borrow money and to secure the repayment of it, with a compensation for the use of it. But that is when it is done in such way as to put the further upon every share of stock alike, in such way as to preserve the equality of right and privilege and value of the shares and

maintain in tact the contract thereto with the stockholder. Citations are made to us for the converse of this, but they do not come up—sometimes in their facts, sometimes in their declaration—to the necessity of the proposition. Either it is where the capital is not limited and it is new shares that may be used with a preference and where there is express power to borrow on bond and mortgage (2 Redf. on Railways, Chap. 33, Sec. 4, §. 237; *Harrison v. Mex R. W.*; 12 English Rep. 793), or the amount of the capital has not been reached, and such stock is issued there from (*Hazelhurst v. Savannah R. R.* 43 Ga 53; *Tottan v. Tison* 54, *ib* 139), or there was legislative authority or a restriction to authorized capital and there was unanimous of the consent of the stockholders, or there was power to redeem, which was a transaction in the nature of a debt or the opinion was *obiter* or it was the case of a subscription for stock with a condition for interest until the corporation was in operation or it was an action on a subscription more favourable to defendant than to other subscribers, and it was held that defendant could not set up the lack of equality or a solemn determination of this question was not necessary for the disposal of the case or the issue was authorized by the articles of association or there was full knowledge on the part of all concerned or the power in the corporate body

was conceded and it was denied that it existed in the directors. It needs not that we consider the position that the issue of the preferred stock was an authorized increase of the capital and so legal. It did not profess to be nor was it in fact. For each share of preferred stock given out a share of common stock was taken in, so that the gross amount of the capital was still the same, and so were the number of shares and the nominal value of each share.”(1)

Let us now turn to the question of liability of members of a company registered under the Indian Companies Act, 1882. It has already been remarked that the principle of liability as it obtains in American and in Continental Europe has some peculiarities foreign to the Indian and English system. Some of the American cases have already been noticed and you remember that I suggested in connection with the American law regarding this matter that a brief reference to the Continental law would reveal another aspect of this fundamental topic. I may take just now an instance from the French law as typical of the continental variation of the principle of liability. The French partnership (*Societe*) is either universal or particular and the question of liability is presented in French law in connection with the partnership rather than with the companies. The commercial partnerships may be put in

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(1) *Kend v. Quicksilver Mining Co.*, 78 N. Y. 159, 179, &c.

one or other of the following classes:—(a) Partnership in collective name, (b) Anonymous partnership, (c) Partnership in goods. The first class corresponds to the unincorporated company the liability is joint and several as well as unlimited so far as third persons are concerned. Troplong says in his *Contrat de Societe*, § 359. “The members are, in a *Societe en nom collectif* indefinitely and solidarily responsible to third persons.” The liability therefore is the heaviest in this class of partnership-companies in French law. The case of Anonymous *Societe* is very different. The members are not personally liable, the obligations of the company bind only its corporate funds, not its members. The capital subscribed constitutes the only security upon which third parties who contract with the *Societe* can count. This kind of business association corresponds to the registered companies of the English and the Indian laws. The third class of business associations combines the features of the first two. This society is neither wholly personal nor real but mixed. It is personal as regards some of its members and real as regards others. Some of the members have unlimited liability while others are mere passive shareholder with a liability limited to the amount of their interest in the Association (1) Persons contracting with this class of *Société* can rely upon two kinds of security, *viz.*, (1)

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(1) Troplong, § 450, *ib.*, § 377.

the capital furnished by the passive members to the solvency of the agents. Since the active members are personally liable the Association holds out the names of these latter as some guarantee of the company's stability. The success of the undertaking depends on them. The passive shareholders do not play an extensive part in the administration of the affairs of the company. As his liability is limited so is his activity. His name is not given out to the public.

The English system has not followed the rather devious ways of the French law. True an attempt was made in 1867 to allow limited companies to have directors with unlimited liability but the Act proved a dead letter. The English Companies Acts in their turn brought into existence a type of limited liability which has been copied in detail by the Indian Act of 1882. Section 61 of this Act specifies the extent of liability of present and past members of a company. "In the event of a company formed under this act being wound up, every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding up, and for the payment of such sums as may be required for the adjustment of the rights of contributories amongst themselves." Certain



qualifications are further detailed in this section. It is not necessary to quote in extense the rest of this section. All that is required for our purposes is that the recognition of this special kind of liability marks out the Indian companies as juristic persons. In fact any seven or more persons Associated for any lawful purpose may be suscribing their names to a memorandum of association and otherwise complying with the requisitions of the Indian Companies Act, 1882 in respect of registration form an incorporated company with a limited liability. All that is necessary so far as formal name is concerned is to add the word limited as the last word in the name of the company. By substituting the liability of the company as a unit for the several liability of the members a legal person distinct from the sum of the members is brought to view. And this is the essential characteristic of a corporation.

The last phase of a company as in the case of other corporations is that of dissolution. The Indian Companies Act, 1882 has laid down the conditions and methods of liquidation. In an application for a dissolution the court has to see whether all the statutory conditions have been fulfilled. Such an examination is necessary for the safety of the creditors. Neither the debtors nor the creditors shoul be given an undue preference. Thus in an application for sanctioning a

scheme approved of by a statutory majority of the creditors of a company in liquidation for payment of its debts and management of its affairs in future, the court has to see whether the majority are acting *bonâ fide*, whether they are coercing the minority in order to promote interest adverse to those of the class whom they purport to represent and whether the scheme is a reasonable one. Here a case decided by the Bombay High Court may be taken as an illustration. The Bombay Cotton Co., goes into liquidation, a meeting of the creditors is summoned under § 203 of the Indian Companies Act and the three-fourth majority in value of the creditors sanction a scheme submitted by the company. The scheme proposes to give the creditor between 9 and 10 annas in cash on the amount of their claims and then to give them preference shares for the balance. It next provides 12½ lacs to be raised on a mortgage of the company's property which will be paid to the liquidator for distribution among the creditor *pro rata* according to the scheme and the company will resume work. Thus the creditor as preference shareholder will have prior interest in the company subject to the interest of the mortgagees for 12½ lacs. The scheme is opposed by creditors of the value of between 5 and 6 lacs although they do not constitute a sufficient proportion to prevent the scheme

being presented. The court observed that the principles on which it will sanction a scheme of this kind were fully considered in *In re Alabama, New Orleans, Texas and Pacific Junction Railway Co.* (1891, 1 Ch. 213). This case was fully discussed in a late case *In re English, Scottish and Australian Chartered Bank* (3 Ch. 315). Here the contest between the majority and minority is whether it will be more favourable to go on with the liquidation and change the company's property realising a good price which would enable the liquidator to pay 2 or 3 annas in the rupee in cash more than the present cash payment or whether the creditors should forego their rights to obtain further cash payment from realisation of the company's assets and get preference shares for the whole of the balance of their claims after deducting what they will receive from the liquidator or trustee under the scheme. Now it is possible for reasonable men to prefer to side with the minority and it is equally possible for men eminently reasonable and acquainted with business methods to prefer to side with the majority. There is no suggestion of mala fides on the part of the majority nor any suggestion that their wishing to coerce the minority for purposes which the court might consider improper. Having heard everything if I were a creditor I would have sided with the minority. Williams J. found

himself in the position in the case last cited but it seems I would rather follow the principle laid down by Lindlay, L. J., that where it is quite possible that there may be reasonable men on both sides some approving and others objecting then the court should give effect to the wishes of the statutory majority unless something is brought to the attention of the court to show that there has been some material oversight or miscarriage. Here there has been no material oversight nor miscarriage. Hence the scheme ought to be sanctioned. The reason why the court is required to be circumspect in matter connected with the dissolution of a company is that the legal consequences arising out of the juridical recognition of personality must always be considered with reference to a rigid, formal doctrine. The characteristics that have grown out of a special concession must not disturb the ordinary state of affairs thereby throwing unnecessary burden on innocent parties.

Another important class of trading corporations in India is formed by the railway companies. These are sometimes called public as opposed to private companies. The dominant characteristic according to Trevor of Indian as compared with English railways is the interest which the Government of India holds, whether as guarantor or partner or proprietor in the entire railway system of the

country. This contrast was marked from the very beginning of railways in India. Though the earliest lines were constructed by private enterprise, by companies which raised their capital from their own shareholders, yet in every case the interest on the capital was guaranteed and the land required was provided by the Government. Hence from their inception the companies depended on Government assistance, and in return for its concessions. the Government besides reserving to itself the right of purchasing the undertakings after terms of years, stipulated for powers of general interference with the working and management thereof, from which English railways started free. Not only were the direction of the line and the situation of the stations prescribed for the company, but the nature of the business that it was to carry on was also determined by Government control; and the business deferred in an important respect from that of early English railways. In England the notion of the railway being a highway for the common use of the public, in the same sense that an ordinary highway is so, was the starting point of railway legislation. There the company might be merely the owners of a highway and toll takers for the use of it by other people with their own carriages and locomotives or they might provide the engines and trucks, but not be carriers. In India this

was never so, but the company was from the first bound by agreement with Government to provide the requisite rolling stock, and to carry on the business of a carrier." (1) So far as Indian railways are concerned a short reference to the Indian Railways Act, 1890 and some other acts such as the Indian Guaranteed Railways Act, 1879 the Indian Railway Boards Act of 1905 would be quite sufficient for elucidating the nature of Railway Companies in India.

The Indian Railway Act of 1890 as modified upto December 1909 has laid down special provisions regarding the inspection of railways, opening of railways and the general administration of the affairs of railway companies in India. It is not necessary to go into these details because they do not elucidate any new point of corporation law. Just as in trading companies that we have already noticed there are provisions for the management and the efficient working of the companies so here provisions of like nature obtain. The only matter deserving special mention is the power given to railway companies of acquiring lands even against the will of the owners for the purpose of executing all works necessary for proper administration and maintenance of works. When the land is taken by Government for the purposes of a railway company the land vests

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(1) Trevor Railways in British India. *Intro*, p. 2.

absolutely in the Government, free, from any right of way previously enjoyed by the public over such land. (1) Lands required by a railway company for accommodation works are lands required for the purposes of the railway. As to payment of compensation for damage caused by lawful exercise of the powers of compulsory acquisition a suit shall not lie to recover such compensation but in the case of dispute the amount thereof shall on application to the Collector, be determined and paid in accordance with the provisions of various sections mentioned in the statute.

The railway companies as juristic persons have special rights and consequently special obligation not present in the case of ordinary legal persons. In some cases questions bearing on *ultra vires* arise, because the peculiarity of a juristic person is its limited legal capacity. Thus in *Lalji Bhai Shamji and others v. The G. I. P. Railway Co.*, the question arose as to whether certain charges called the "terminal" charges were within the authority given to the company by the incorporating act. The Court said "The company base their right to levy the charges on their incorporating Acts 12 & 13, Vict. C. 83, § 5 and on their agreement with the East India Company, dated 17th August 1849, clause 8; on the subsequent contracts,

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(1) *Taylor v. The Collector of Purnea*, 14 Cal. 423.

agreements and arrangements from time to time made between the company and Government and in particular on Government resolution No. 2052 of 1865 and the Bombay Government notification, dated 30th April 1868 . . . . . The only terminal charge sanctioned by Government was a charge sanctioned in 1865 and then expressly defined as including collection and delivery. The defendant company had since that date given up collecting and delivering but there had been no new scale of terminal charges submitted for sanction or sanctioned. It was consequently contended by the plaintiffs that the terminal charge now levied had never been sanctioned. A review of the proceedings leading to the sanction of 1865 showed that Government had contemplated the possible abandonment by the company of collection and delivery when it sanctioned the rate then fixed and that consequently it must be presumed that Government had left it to the defendant company to make such deductions in case of abandonment of this portion of their services as they should think proper which they had done." (1) Thus you see that the test regarding *ultra vires* is applicable as would naturally be expected, to the case of railway Companies just like the ordinary trading Corporations.

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(1) I. L. R. 16 Bom, p. 434.



Before taking up the fundamental question in connexion with Railway Companies, viz, their position as carriers in India it is necessary to note that the railways in India may be broadly put under four classes :—(1) Proprietary lines worked by guaranteed companies. (2) Proprietary lines worked by assisted companies. (3) State lines worked by guaranteed, assisted and other companies. (4) State lines worked by Government. These railways have their positions fixed by various contracts entered into in pursuance of statutory powers given to them. The details of these contracts need not delay us here. The only point that deserves special mention is that the contract in the case of experimental lines generally contains provisions for the opening of the railway contemplated and for the safe carriage of passengers and goods. The condition for acquisition of lands are the same as in the case of permanently established railways.

The fundamental topic in the present connexion is the one about the rights and duties of the railway companies as carriers in India. The legal position brings out the special features of group-persons. The *Rechtsfahiq Keit*, you remember, would determine the position of these bodies in a systematic classificatory scheme. Here we approach the borderland separating theory from practice in the legal domain. I must begin by observing

that the doctrine of common carriers is derived from the English common law. One main object is to find out how far that doctrine has been modified by Indian decisions and enactments touching the railway companies. It appears from the case of *Kuverji Tulsidass v. G. I. P. Railway Co.*, (1) that the question of the liability of railway companies as common carriers for loss or damage to goods, in the absence of special contract, where such loss or damage was occasioned not by the negligence or misconduct of the companies or their servants was, previously at any rate to the Indian Contract Act, left untouched by legislation, and if it had arisen before that Act, would necessarily have been decided by the common law, which would have treated the common carrier as an insurer against, all risks, except the act of God or the King's enemies.' (1) This is the opinion of the courts so far as the condition of facts before the Indian Contract Act is concerned, here an agreement is noticeable between the opinion of Bombay and that of the Calcutta High Courts. But the same cannot be said with regard to the effect of the Indian Contract Act on the rule about the common carriers as obtaining in the English common law. Mr. Prevor has analysed the Indian decisions on the point

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(1) I. L. R. 3 Bom., 116.

and it is worth one's while to follow the line of thought suggested by him. The first section of the Act that nothing in the Act shall effect the provisions of any Statute, Act or regulation not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act, § 151 says "In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." According to § 152 the bailee in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in § 151. These sections were held by the Bombay High Court in the case already cited to apply to common carriers, in the place of the old common law rule as it obtained in England. As to the particulars of this rule I may refer you to Goodeve or any other well known authority on the law of bailment and carriers. The only point to be remembered, so far as our subject is concerned, is that the principle of liability is fixed by the same general conditions in the case of a group person as in the case of individual legal persons. You are made liable whenever it can be said that you have set the motive power free where-

by damage has been caused. The common law rule was based on this basic principle of liability. It remains to find out the trend of Indian decisions modifying the English law. According to the Bombay Court the liability of insures to that of bailees under the Indian Contract Act, which makes no distinction in this respect between bailees for hire and gratuitous bailees. But in *Moothura Kant Shaw v. The Indian General Steam Navigation Co.*, the Calcutta Full Bench held that the common carriers were not relieved from their common law liability by the Indian Contract Act. Garth, C. J., said "If the Bombay Court is right, any contract or usage of trade which is inconsistent with the general law laid down by the Contract Act is invalid. Now it seems to me impossible that this was intended. The Act only lays down certain general rules, which, in the absence of any special contract or usage to the contrary, are binding on contracting parties. But it could never have been intended to restrain free liberty of contract as between man and man, or to invalidate usages or customs which may prevail in any particular trade or business. These customs and usages have only the effect of introducing special terms into all contracts or dealings in any particular trade: their very object is generally to modify or control the general law; and the Contract Act, in my opinion,

could never have intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with those rules." Again Mitter, J., said among other things "The rule of English law regulating the responsibility of a common carrier is not inconsistent with the provisions of the 152nd section or any other section of the Indian Contract Act. That rule consequently remains unaffected by the Contract Act as provided in its first section."

The Court then proceeded on to consider how the question was affected by the § 10 of the Indian Railways Act, 1879. "The obligation or responsibility," it was remarked, "imposed on a carrier by railway by the Indian Contract Act, 1872, Sections 151, 161 in the Case of loss, destruction or deterioration of, or damage to property. I have already quoted Section 151. Section 161 says. "If by the fault of the bailee the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction, or deterioration of the goods from that time." According to Garth, C. J., from this section it cannot be inferred that the Indian Contract Act relieves all carriers in India from any common law liability because, he observes. "In our opinion the

contract act was intended to leave the liability of common carriers as it was before the act was passed, the fact that the Railways Act several years afterwards alludes to sections 152 and 161 as applying to carriers by railway, is not, we think, sufficient to justify us in giving to the Contract Act a construction which we disapprove and which we believe to be contrary to its meaning. Besides, it is really difficult to say what the legislature did intend by sec. 10 of the Railways Act. Very possibly it may have taken for granted that the view of the Bombay Court was right, or it may have supposed that carriers by railway were not common carriers."

Section 10 of the Railways Act of 1879 was Considerd at length by Mitter, J., who observed that this section did not say that the provisions of sec. 151 of the Indian Contract Act, 1872 should be the measure of the responsibility of a carrier by railway. It simply provided that if he intended to reduce his responsibility below that provided in sec. 151 of the Indian Contract Act, he should comply with the provisions of clauses (a) and (b) of section 10 of the Indian Railways Act, 1879. "The sec. 10 does not declare what shall be the measure of his liability, but lays down the particular mode in *which alone* he can reduce it below a certain degree. The section in question does not say that in the absence

of special contract referred to therein, that liability shall not be regulated by the rule of the English common law on the subject. Section 10 of the Indian Railways Act, 1879 is analogous to section 6 of the Indian Carriers Act, 1863 which by section 2 of the act does not apply to carriers by railways. The object of both sections is not to declare what shall be the carrier's liability but to provide for the mode in which alone he can limit that liability whatever it may be according to the law in force." (1)

Thus you see that there is a divergence of opinion so far as the extent of liability under the Contract Act of a common carrier for goods is concerned. You must note, however, that the difference of opinion refers to the legal position of the carrier as a bailee. It should also be observed that the new Railway Act, namely, Act IX of 1890, has sanctioned the view taken by the Bombay High Court, so far at least as railway administrations are concerned and has laid down that the responsibility of a railway administration for the loss, destruction or deterioration of animals, or goods delivered to the administration to be carried by railway, shall, subject to the other provisions of the act, be that of a bailee under secs. 151, 152

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(1) I. L. R. 10 Cal. 166. quoted by Trevor on Indian Railway, page 62.

and 161 of the Indian Contract Act of 1872 ; and nothing in the common law of England or in the Carriers Act, 1865 regarding the responsibility of common carriers with respect to carriage of animals or goods is to affect the responsibility (as defined in this section), of a railway administration, the effect then of this section is plainly to cancel so far as the Railway administration in India is concerned, the English common law rule under which the common carriers are regarded as absolute insurers except in the case of damage caused by an act of God or by the king's enemies. A carrier, however, it may be repeated, does not cease to be a carrier simply because his liability is reduced under certain circumstances. I may draw your attention in this, connection to the general rule mentioned in a previous lecture regarding the *rechts fähigkeit*, as Nembeker has termed, of a group person. The fundamental position of that person is unaltered although the orbit of his activity may be circumscribed if need arises.

So far I have taken it for granted that the railway companies may be regarded as common carriers in India. Some doubt may be thrown on this assumption from the fact that nothing in the Carriers Act, 1865, was to apply to carriers by Railway. But the prohibition refers to the liability for loss or damage caused



under certain circumstances and is not intended to exclude the Railway Companies from the class of common carriers. In fact it was expressly laid down in *Iswardas Golap Chand v. G. I. P. Railway Co.*, (I. L. R. 3 Bom. at p. 129) that a carrier for the purposes of the Carriers Act, 1865 meant "a person (including any association or body of persons whether incorporated or not) other than Government engaged in the business of transporting for higher property from place to place, by land or inland navigation, for all persons indiscriminately." Thus there can be no doubt that the assested railway companies as well as the guaranteed railway companies are common carriers in India. Whether the railway administration of state railways are common carriers is a more difficult question. In the case of the Deputy Post-Master of Bariely *v. Earle* (1), it was pointed out that the legislature expressly exempted the Government from the class of persons who might be called common carriers as understood in the Carriers Act, 1865. It was further observed that the intention of the legislature was to declare not only that the Government as a carrier should not be subject to the provisions of the Act, but it should not be regarded as a common carrier because the Act applied to all persons in India who fell within the definiton. According to this view

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(1) 3 N. W., p. 195.

the Government, with reference to its carrying business should be regarded as an ordinary bailee for hire. On the other hand Garth, C. J., took a different view in the case of *I. G. S. N. Coy.* (2) already quoted. He said "it is certainly a very remarkable thing that in the definition of common carriers in the Carriers Act of 1865, the Government for some reason or other are excluded from that category. It is difficult to conceive why, if carriers by railway are ordinarily common carriers, the Government if they engage in that business are not to be subject to the same laws and liabilities as other carriers. If the Government engage in any trade for purposes of profit, there would seem no good reason why they should be exempt from duties and liabilities as against the public, by which private persons engaged in that trade are bound; yet the exclusion of the Government from the definition of common carriers in the Carriers Act would seem to mean one of two things—either that they were not to be subject to the duties or liabilities of common carriers, or that being common carriers they are not to share in the benefit conferred by that Act. Considering the large share which the Government have now appropriated to themselves in the carrying trade and business of the country, it is certainly very desirable that their position, as against the public should

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(2) *I. L. R.* 10 Cal. 166.

be statesfactorily defined." Subsequent legislations have partially removed the doubts expressed by the different court as to the legal position of State Railways in India, *e.g.* The Act XIII of 1870 enacts that the Railway Act of 1854 shall apply to all railways now or hereafter belonging to Government, but worked by a railway company in the same manner as if such railways belonged to and had been opened by the company and that, subject to certain verbal modifications, the said Act shall apply to all railways now or hereafter worked by Government, in the same manner as if such railways had been opened by a railway company. Again the Act IX of 1890, includes under the head of railway administrations the Government as well as companies and applies to all railway administrations alike, subjecting them all to the same statutory obligation to give reasonable facilities for traffic without undue preference, and to the same statutory liability in respect of goods and animals entrusted to them for carriage. When the legislature wished to place the state railways on a different footing, it inserted a special clause to that effect. Thus the Sec. 79 of the new Act specifically says that in the case of injuries to officers and soldiers on duty upon a railway, the liability of the Government would not be the same as that of other administrations. It is quite reasonable then to infer from these

statutory provisions that the duties and liabilities of Government as a carrier by rail are except when specially limited by legislation are the same as those of private railway companies. The Government holds itself out "to carry for the public, it is a common carrier, and subject to the rules of the common law affecting carriers in India."

The positions of Indian carriers by railway is determined in general by the English common law rule. The only modification is that due to special legislation affecting the Indian railways in certain particulars. To illustrate the rights and duties of Indian railways as carriers some of the English decisions may be considered with advantage, because the Indian law on the subject is more or less modelled on the English originals.

The first topic in this connection is concerned with the liability of a company receiving goods for carriage beyond its own line. In *Willey v. West Cornwall Railway Company* (2 H. & N. 703) it was observed that when a company receives goods to be carried to a station beyond their own line, *prima facie*, they contract to carry them to that place, eventhough, part of the carriage should be by water and according to *Muschamp v. Lancashire and Preston Reul. Co.* (8 M. & W. 421), and *Bristol and Exeter Railway v. Collin* (7 H. L. C. 194), they only can be sued by the owners

if the goods are lost on the line of a second company unless by the special terms of the contract, the first company are expressly exonerated from liability beyond the limits of their railways. In India, however, the statute has introduced a modified rule by allowing alternative actions against one or other of the companies. (Sec. 80, Indian Railways Act, 1890).

If by agreement the traffic upon two lines is carried on for the joint benefit of the two companies, so that their joint principals if not parteners, either may be sued. English decisions have gone to the limit of making the second company liable when a through ticket was taken although the second company had not issued it. The fact that the latter had received passengers luggage into their van and had carried it negligently was regarded as sufficient for making it responsible for the loss to the passenger. So early as 1885, *Smoth, J.*, remarked in *White, S. E. Railway Co.* (1). That the law in such cases had been pretty well settled. If a party booked goods through, by one company for a journey going over more than one line of railway, he might in case of damage to the goods of any part of the journey, sue that company and he might also sue the other, if the damage occurred upon their line and by their negligence but not otherwise.

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(1) *Times L. R.* 319.

The Sec. 80 of Indian Act has, in essence, recognized this principle. It enacts that "notwithstanding anything in any agreement purporting to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to a passenger, or for loss, destruction or deterioration of animals or goods, where the passenger was or the animals or goods were, booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction, or deterioration occurred."

A question may naturally be asked in this connection. Is the carrier liable for natural deterioration or inherent vice? According to the common law when goods are in the carrier's custody, he is responsible for every injury sustained by them occasioned by any means whatever, except only the act of God or the king's enemies subject to the additional qualification that he is not responsible for damage occasioned by natural causes or inherent *vice*. For example if oranges or other fruits are

damaged through decomposition setting in or liquids are diminished in quantity through evaporation or through leakage due to careless packing, the loss in such cases falls on the consignee. This common sense principle of liability obtains in their country as well as in England.

It is not necessary to go into further details regarding the position of railways in India. The Indian legislature has adopted with necessary modifications the English law of carriers and consequently the details of railway law are nothing but amplifications of the law of common carriers. So far as our subject is concerned, the only point of contract between the law of carriers and the law of corporations as exemplified by the railway companies is that the variation in the character of railways as juristic persons depends on their position in India. In other words the privileges, rights, duties and liabilities vary according as the railway is a state Railway or a guaranteed railway or a private railway. As to the other characteristics of trade incorporations there is a fundamental similarity between a railway company and a business company or a mining association. The rules about the creation, existence, dissolution, are the same here as in the cases of companies already discussed. All that can be asserted with regard to private companies may, *mutatis mutandis*, be predicated about the

railways. It is therefore, unnecessary to repeat what has already been stated as to *ultra vires* and the doctrine of representative action. A railway company is a group person and consequently the marks that constitute such an entity must be present in it. The instances of special liability quoted above serve to establish the basic unity that underlies all species of corporations.

Let us now pass on to foreign companies. The topic that presents itself at the very start is the doctrine of status so far as foreign companies are concerned. A company is foreign, as opposed to domestic is one which owes its existence to the laws of another state, Government or country. It has already been observed in a previous lecture that corporations having the same name and powers and under the management of the same directors and officers and with a common stock and the same stock holders may be created by or under the laws of several states. A common example is furnished by the railway companies in America. In such a case there is in the contemplation of law not one corporation governed by the laws of all the states but a separate and distinct corporation in each state. Thus the question of domicile determining the status of individual corporations naturally arises in such instances. Sometimes in order to avoid complications companies trading in one



country are incorporated in another country where the majority of share-holders reside, *e.g.*, The Calcutta Electric Supply Corporation limited is incorporated under the British act in England. But more frequently foreign companies present complicated questions of private international law. The first and foremost of these is the one connected with status. According to Savigny "The individual man clearly carries with him his claim to civil capacity in his corporeal appearance. By this appearance every one else knows that he has to respect the personal right of such a being, and every Judge that he has to preserve them" (1) or as Fiore has put it "Man considered as a member of a human race has an individuality of his own, sphere of action which includes all part of the globe, a legal capacity belonging to him by reason of his very existence and independent of that which he has as the citizen of some state." (2) A natural person having a natural body can pass from state to state and be recognized as a legal person in different states. Can this principle be extended so as to include juristic persons? The doctrine of status as applied to foreign corporations, answers this question in the affirmative. It must, however, be observed that in the abstract the question regarding the

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(1) Savigny, Sec. 83 quoted Young, *Foreign Companies and other Corporation*, p. 22.

(2) Fiore—*Diritto Inter. Cod.* No. 317.

status of a corporation is meaningless. It must always be considered with reference to some positive law. The importance of this remark is borne out by the fact that the attempts made by several jurists to find out reasonable answers to the abstract questions has always ended in failure. The only practical solution is the one obtained through a process of classification having a direct reference to one or other of the legislative systems of civilized countries. At one time a foreign juristic person was not given a personal status in most of the countries. That was when restrictive systems prevailed. The famous Belgian Jurist Laurent was a great supporter of the restrictive system. He writes—"Before deciding in absolute terms that corporations have the same rights abroad as individuals, it is necessary to consider if they exist outside the limits of the territory where they have been created. It seems evident to us, however, that they do not : a result which follows from the very nature of incorporation. The legislature alone has power to create a juristic person. Its power, however, ceases at the limits of the territory of the nation which has delegated to it legislative power ; beyond these limits it exercises no authority ; therefore the corporations which have no existence except by its will do not exist in any place where that will is without force and without effect. The corporation has its existence from the law and

the law can recognize it within the limits of the territory over which it exercises dominion ; the legislature cannot, if it would, give it a universal existence and the fiction implies the recognition of the legislature. In order that there might be a universal fiction, there would have to be a universal legislature. A universal fiction created by local legislature is an impossibility ; therefore to speak of juristic persons as existing everywhere and exercising their rights everywhere is a heresy." (1) The French *cour de cassation* has adopted in substance the view propounded by the Belgian Jurists. According to the French law a joint-stock company is a person by a fiction of law and therefore derives its authority from some formal source in a country. It follows as a matter of course that a foreign company however legally established in one country cannot be recognized in France unless it has prescribed its existence in accordance with the rules of the French law. The United States at one time accepted a similar doctrine. Marshall, C. J., remarked in an American case. "It is very true that a company can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in the contemplation of law and by force of the law and where that law ceases to operate and is no longer

(1) Laurent Droit Civil International, Vol. IV, Sec. 119 quoted Young, *Loc. Cit.*, p. 25.

obligatory, a company can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty." (1)

The view taken by the modern international law is however tending to an opposite direction. The status of a foreign juristic person is determined in this view according to the principles derived from the theory of comity. Out of comity is fashioned for the foreign companies a right of recognition based upon implied consent. Unless the state has made it plain in its legislation that the recognition of foreign juristic persons or of some particular class of them, is contrary to its policy or interest, the laws of the state of origin of foreign juristic persons which relate to their creation are to be treated as the objects of comity as much as any other laws of that state. So the personality of a foreign company needs no express recognition. In *The people of State of New York v. Earl* already referred to it was observed "where a state does not forbid, or its public policy, as evidenced by its statutes is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its law. But this right is still founded upon consent which is implied from comity and absence of prohibition." (2)

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(1) Young, *Loc. Cit.*, page 26.

(2) Young, *loc. cit.*, p. 42.

It must however be observed that as comity is not compulsion, a foreign corporation has no absolute right of recognition in other states, but it depends for such recognition on their assent and consequently such assent is granted upon such terms and conditions as those states may think proper to impose. It may naturally be asked in what sense then can it be said that a foreign corporation is capable of being recognized by another law (?) The answer to this question is supplied by the observation that the word recognition which implies the pre-existence of some objective reality is meaningless as applied to fictitious personality. It will not do therefore to follow the fiction theory and the connected doctrine incorporated in what is called the restrictive system of law. When a group apparently constituting a single commercial company carries on business in several states there are as many juristic persons as there are states. Since all the various juristic persons may be and probably will be, precisely alike the distinction between recognition and recreation is futile. In practice therefore the modern international law frequently deals with foreign companies as legal entities invested with rights and duties that turn them into juristic persons.

As regards the legal capacity of foreign companies the principle of private international law is that they have the rights of entering

into contracts as governed by the international arrangement between states concerned and that the law of comity does not require a state to recognize and enforce contracts made within the state by a foreign company when to do so would be contrary to the laws or public policy of the state. Again the law of comity does not allow one state to create and send forth corporations into other states to do business there when the state creating them will not allow them to do business within its own boundaries. Thus in an American case where a corporation was created by the laws of Pennsylvania and its charter provided that it might do business anywhere except in the state of Pennsylvania it was held by the court that it could not do business in the state where the court was situate.(1) Moreover the comity between states does not require the courts of a state to recognize as valid a corporation formed by its citizens in another state, either in evasion or fraud of its own laws or in fraud of the laws of the other state. Whether a fraud upon the laws of the other state has been committed depends, however, on circumstances attending the establishment of a corporation.

An important question that arises in connection with contracts by a foreign Company is that of vested rights. If a state has

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(1) *Land Grant Railway, &c., v. Coffey, &c.*, 6 Kan. 245.

permitted a foreign Company to make contracts or acquire property within its limits a statute subsequently enacted cannot impair its right to enforce such contracts or deprive it of its right to the property. Thus it was held that compliance by a Corporation with a statute requiring foreign Corporations to file an irrevocable power of Attorney authorizing the Secretary of States to accept service of process for it, did not create a contract between the Corporation and the state so as to render void, as impairing the obligation of contracts, a subsequent statute making the Corporation amenable to process by service on other agents than the one so appointed. The rationale of the decision was that although a statute could not take away a vested right yet the granting of a mere license to a foreign Corporation by a state, did not create a contract between the state and the Corporation so as to prevent subsequent legislation revoking the license or imposing new conditions. (1)

There are certain restrictions and limitations of charter and of general laws of domicile with reference to foreign Corporations. A Corporation cannot properly exercise in another state or country any powers which are not conferred upon it either expressly or impliedly by its charter. As a general rule it is also subject to general legislation of the

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(1) *American Building, &c., v. Rianbolt* 48 Neb. 434.

state of its creation. Chief Justice Waite remarked "wherever a Corporation goes for business it carries its charter as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the Corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere." (1)

As regards English law it should be remembered that in general it never gives us as positive law an abstract principle of jurisprudence. The Courts act indeed upon such principles and base their decisions upon them, but it is the rule that a certain course of action is to be adopted in certain circumstances that is positive law ; not the principle from which that rule is deduced. Young remarks "except in rare instances in which the principle is confirmed by a statute there is and can be no authority for the general principle as distinguished from the practice in particular cases." (2) Hence the principle of English law about foreign Corporations must be extracted from the decided cases. I shall take up some of them in order to explain the position of foreign Companies in English law so as to

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(1) Canada Southern Railway, Co., v. Gebhard, 109 U. S. 527.

(2) Young, *loc. cit.*, p. 169.



find out the fundamental principles that may be applicable to Indian conditions.

The first point to notice is that foreign Corporations have status as persons in England and the law of England recognizes them. The leading English case upon the subject is a very old one ; it was decided by the King's Bench at the instance of the Dutch West India Company. The Company sued in the King's Bench for money borrowed by the defendant at Amsterdam. At the trial at *Nisi Prius* they were made to give in evidence the instruments whereby, by the law of Holland they were effectually created a Corporation there : and had judgment, the jury finding that the plaintiffs were the Company who had lent the money. It was reserved for discussion, (1) whether the articles of debt in question could be sued in England, (2). Whether this was a good name for the Company to sue by but on a motion to set aside the verdict in the Common Pleas the Court were all of opinion for the Company on both points. On error this judgment was affirmed in the King's Bench and in Parliament. (1) Before Parliament it was argued that the law of England did not take any notice of any foreign Corporation and that a foreign Corporation could not in their corporate name and capacity maintain an action at common law in England. But it was decided that such a proposition was

not tenable. Hence this case is an authority for the statement that a foreign Corporation can appear in its corporate character before the English Courts and be regarded as a person by the laws of England. (1) It may be mentioned as strengthening this thesis that foreign Corporations have status as persons in England by virtue of conventions made with France, Belgium, Italy, Germany, Spain, Greece, Tunis, Austria and Russia for the mutual admission of Commercial Associations to civil rights. Prof. Dicey says with regard to the right of a foreign judicial person to enjoy its personal law that "any right which has been duly acquired under the law of any civilized country is recognized and in general enforced by English Courts." (2) Mr. Foote is perhaps the only English authority who seems to have adopted a contrary view. According to him in spite of *Henriques v. General Privileged Dutch Company* "the Courts of all countries are open *primâ facie* to natural persons and no others." (3) But the greatest English authority on all questions arising in International Law, Prof. Westlake—maintains consistently with the view of the English Court "that in dealings with others (an artificial person) stands on the footing of natural persons domiciled

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(1) 2 Raymond, 1532, quoted by Young, *loc. cit.*, p. 170.

(2) Dicey—Conflict of Laws, Rule 126, General Principle 1.

(3) Private International Law, 3rd Edition, p. 126.

abroad." (1) It seems therefore that according to the majority of English jurists a foreign Corporation possesses status and capacity in English law.

Some other propositions that have been definitely laid down by the English Courts may be shortly stated as follows:—(I) A foreign Corporation can sue and otherwise initiate legal proceeding in English Courts. This, however, is a corollary immediately deducible from the principle explained just now for legal personality is nothing other than the capacity of being a subject of legal rights and duties. Hence once personality is recognized it follows as a matter of course that the person can sue or be sued in the court of the country where such personality has been recognized (2). Of course the court may ask for security when a foreign company is suing as a juristic person. Thus Pollock, C. B., said, in the *Kilkenny and G. S. & W. Railway Co. v. Fielder*, "persons out of the jurisdiction whether individuals or corporation suing in the courts here must give security for costs unless they have real property in this country or at least property of a permanent nature, for personal property is insufficient." (3). (II) A foreign Corporation which itself carries on

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(1) Westlake, p. 358.

(2) Young, *loc. cit.*, p. 173

(3) (1851) 6, Ex. 81 at page 84.

business here (*e.g.*, in England) at a place of business is subject to the jurisdiction of the court *in personam*. The authority for this statement is *Carron Iron Co. v. Mac Laren* (1) where Lord St. Leonards definitely laid down his proposition. It was later on confirmed by the case of *Duder v. Amsterdams a Trustees Kantoor* (2). In this case Byrne, J., said "If the defendants are resident in England, no doubt the plaintiffs are entitled to enforce the prior equitable charge against them." (3) A foreign corporation like a foreign natural person is subject to the *Lex fori* in matters of procedure in English courts. Thus it was held in *Barber v. Mexican Land and colonization Company, Ltd.*, that an American Court had no power to authorize an individual to bring an action in an English Court in the name of an American Company, since no foreign court can alter the procedure or practice of the English Court, (III), (IV). A foreign Corporation can perform its functions in England without restrictions or the necessity for previous authorization except as expressly limited by statute. The statutes referred to are the Assurance Companies Act, 1909 and the Companies Consolidation Act, 1908 which have been already noticed at the beginning of

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(1) (1855) 5, H. L. C. 416.

(2) (1902) 2, Ch. p. 132.

(3) 48 W. R., p. 236.

the present lecture (V) The status and capacities of a foreign corporation would probably be regulated by the English personal law in England. There is no decision on this principle but it seems to have been tacitly assumed in a majority of cases. I may refer you to Young's Foreign Companies for a detailed discussion of this topic. (VI) Whether a foreign association or other body possesses personal status or not must be determined by the law of the country whence it came. This rule has some exceptions. In a famous case the personal status of a body was not recognized by the English Court although according to the law of the country of its origin it undoubtedly possessed a personal status. The case is that of *Bullock v. Caird*. Here the defendant pleaded in an action for breach of an agreement that the agreement was made with a firm domiciled in Scotland of which he was a member; that by the law of Scotland the firm was a person distinct from its members and capable of being sued and of suing, of holding property and of being a debtor and creditor and that judgment against the firm was a condition precedent to individual liability. On demurrer it was held by the court that these were matters of procedure only, which must be governed by the *lex fori*. Blackburn, J., remarked that it was quite clear that the firm was not a corporation. Some,

however, think that this decision is wrong because a great number of similar cases took up a different and a more rational view. (VII) The law of the country in which a corporation is domestic determines (a) the constitution of a foreign company (b) the legal relations of its members *inter se* and towards the corporation (c) their liabilities towards third parties. These rules have been well established by various decisions and dicta of the judges. The authorities are so well known that it is not necessary to take them up in detail. (VIII) A corporation resides wherever it carries on business at an office or other places of business. The principal residence is at that place at which the principal centre of its administrative business is situated. This rule, as you have no doubt noticed applies to domestic as well as to foreign corporations. The Indian Companies Act, 1882 has adopted a similar criterion as to residence. The question is of importance in connection with the registration of a company because residence determines the place of registration. In *Attorney-General v. Alexander* it was held that the Imperial Ottoman Bank A Turkish Company was not resident within the United Kingdom because their London business was a mere branch and not the chief seat of carrying on the business of the bank. Kelly, C. B., said "if it is resident anywhere it is resident at Constantinople

where alone it has its seat under the express terms of its charter.”(1) In the *Cesena Sulphur Company, Ltd. v. Nicholson* and *The Calcutta Jute Mills Company, Ltd. v. Nicholson* the subject under consideration was fully discussed. It was held in the latter case that the Appellant Companies which were registered under the Company Acts to work mines in Italy and to manufacture jute in Bengal respectively were resident within the United Kingdom because as Kelly, C. B., observed “whether there may or may not be more than one place at which the same Joint Stock Company might reside was a different question, but a joint stock company resides where its place of incorporation is, where the meetings of the whole company are held—or of those who represent it, and where its governing body meets in bodily presence for the purposes of the company and exercises its powers. The Great Western Railway Co. resides at Paddington and the London and North-Western Railway Co., resides at Euston, because there is the principal seat of business of the company, there the directors meet and exercise their powers, there the books are kept and from there the great lines emanate.” And Huddleston, B., remarked “the use of the word residence is founded upon the habits of a natural man and is therefore inapplicable to the artificial and legal person whom we

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(1) (1874) L. R. 10 Ex., p. 20.

call a corporation. But for the purpose of giving effect to the words of the legislature an artificial residence must be assigned to this artificial person and one formed on the analogy of natural persons. There is not much difficulty in defining the residence of a natural person. It is where he sleeps and lives—therefore when you deal with a trading company it means the place, not where the form or shadow of business, but where the real trade and business is carried on. There is a German expression applicable to it which is well-known to foreign jurists, “*Der Mittelpunkt der Geschäfte* ;” and the French term is “*le centre de l’entreprise* ;” the central point of the business. The Attorney-General cited a proposition to which I cannot assent. He suggested that the registration of a company was conclusive of its residence, that if a company was registered in England it must be held to reside in England. Registration like the birth of an individual is a fact, which must be taken into consideration in determining the question of residence. It may be a strong circumstance, but it is only a circumstance. It would be idle to say that in the case of an individual the birth was conclusive of residence. So drawing an analogy between a natural and artificial person you may say that in the case of a corporation the place of its registration is the place of its birth and is a fact to be considered with all others. If you



find that a company which is registered in a particular country acts in that country, has its office and receives dividends in that country you may say that those facts coupled with the registration lead you to the conclusion that its residence is in that country . . . . the artificial residence which must be assigned to the artificial person called a company is the place where the real business is carried on.”(1) In a more recent case the principle of this decision has been fully confirmed. (2) It is now practically settled that in the absence of direct evidence the place where the centre of administrative business lies is the place of residence. (IX) The domicile and nationality of a corporation is to be determined by reference to the rules regarding certain special duties and privileges such as those of allegiance which, however, are mainly political rather than juridical. And sometimes it has even been doubted as to whether a corporation is capable of enjoying these special privileges. In *Nabab of Arcot v. The East India Company* it was said by Lord Thurlow “a fictitious body of subjects formed by a charter is as mere a subject as natural bodies in a state of subjection to the sovereign authority of the country. Therefore they are pure subjects, to all intents and purposes whatsoever.” From this it has been

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(1) (1876), 1 Ex. D., p. 428.

(2) *Gocz and Company v. Bell* (1934), 2 K. B., p. 136.

inferred that a corporation may have all the rights and duties peculiar to an artificial body but it cannot be said to possess *all* the rights duties and privileges of a natural subject. (1)

The English law has not concerned itself to lay down any express rules regarding the nationality of a Corporation. The only sense in which a Corporation can rightly be said to be English is if it is subject to English law as regards its internal constitution and relations of members *inter se*. In other words if it is subject to the English law of persons. All other corporations are foreign corporations. The question of nationality is, however, of fundamental importance because it is this that determines whether in a given case the English legislative rule or the principle of international country is applicable. In the *A. G. v. The Jewish Colonisation Association* one finds some authority for the proposition that the nationality of a Corporation is determined not by the place where the centre of administrative business lies but by the place at which it is registered. There a foreigner domiciled in Austria gave certain securities to a Company registered under the English Company Acts in trust after his death for the purpose of emigrating Russian Jews. The business of the Company was transacted in accordance with

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(1) (1791), 3 Bro. C. C., p. 303. See also Young, *loc. cit.*, p. 204.

its articles of association by a council which met at the principal office of the Company which was in Paris. But the general meetings of the Company at which formal business only was transacted, were held at the registered office of the Company in London. On the death of the donor it was held that the Company was an English Company, that recourse was necessary to English law to enforce the trust . . . . . It was argued that the domicile of the Company was French but it was said in the Court below by Ridley, J., "on that view the domicile could be changed by a mere resolution to hold the meetings elsewhere and that does not seem reasonable;" and by Darling, J., "I come to the conclusion that the Jewish Colonisation Association is domiciled in England." Their judgments were confirmed by the Court of Appeal. It was there said by Smith, M. R., "that it is an English Company, I do not doubt, subject to English law, and the fact that there was a council of administration which carried on the business of the company outside of England does not render the company any less an English company subject to English law." And by Sterling, L. J., "Being an English company it is necessarily under the jurisdiction of the English Courts, and while it may acquire a foreign residence and domicile so as to be capable of being sued in a foreign country it must I apprehend be capable

as long as it exists of being sued in the country of its origin."

There are certain statutory regulations affecting foreign companies. But as those are of purely territorial interest and are not capable of amplification it is not necessary for our purposes to discuss them. These Statutes are mainly English and have not yet entered India in any shape. So it is not possible to draw a general inference from them so that it may be applicable to Indian conditions.

The trading corporations therefore admirably illustrate the fundamental conceptions underlying the theory of juristic personality. It is true that in England as well as in India practice has overridden theory yet it must be admitted that a unifying principle is deducible so as to build up the apparently discrepant practical rules into a solidary system with the help of that cementing principle. The subject of the next lecture will make this clearer. Let us therefore pass on to the Municipal Corporations.

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# NOTES

ON

## LECTURE IX.

1. For a general survey of the topic dealt with in this lecture Stammler—*Theorie der Rechtswissenschaft* may be consulted. The personality of a corporation has been the topic of controversy with all the latest continental jurists. Stammler gives a realistic theory and points out the tendency of modern law towards personification of juristic bodies.

2. A comprehensive review of the juristic nature of companies is given by Gierke in *Deutsches Privatrecht* Vol. I, p. 479—556. The discussion turns upon the juristic reality of group person. The *leit motif* is in Maitland's formula "n individuals grouped together give birth to an (n + 1)th person." The introductory line "The general concept of a corporation coincides with that of *Roman Universitas*" shows that Gierke is fully alive to the reality of corporate personality."

3. The Indian law regarding companies has not been fundamentally changed by the Indian Companies Act (Act VII of 1913). There have been some changes in detail. The spirit of the company law is English and the theoretical part may well be illustrated by the European law. A useful comparative study of companies is that by Marinesco—*Sociétés anonymes, &c.*, Paris 89, H. Staub *Kommentar zum Handelgesetzbuch*, (1900) is very useful.

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## LECTURE X

### **Municipal Corporations.**

Municipalities are local institutions that have been introduced into India from outside. To follow the development of the municipalities into juristic persons requires some knowledge of their origin in European countries. We shall shortly take up the legal side of this subject, historically considered, before entering into discussions regarding the characteristics of Indian municipalities. Kemble remarks that the organisation of Municipia and Military stations in Roman provinces was duplicated in Britain. The Antiquarian aspect of the question need not detain us here, all that is required in elucidation of the legal problems connected with municipalities would be supplied by considerations regarding the external growth of towns in Britain.

The actual transfer of powers from a feudal seigneur, whether king, noble, bishop or abbot, to a body of his vassals, or the confirmation by him in them of powers already assumed or retained in the form of local customs, was usually evidenced by the delivery of a written instrument a charter, in return for the payment of a sum of money or the rendition of some other consideration.

The powers, the franchises or liberties of the towns fall under the following heads (1) The *firma burgi*; (2) Tenurial privileges; (3) Mercantile privileges; (4) Municipal Courts. After the growth of the external side the internal aspect of the towns was considerably changed. The noticeable features in the latter respect were the town constitution, the town legislation, and taxation: Much of this is subject matter for constitutional history and does not concern us here. The only portion of legal interest is connected with the decay of corporate town life and exertion of the legislature to transfer the actual work of government from the absolescent corporations to country authorities, justices of the peace, parish authorities, commissions and boards. Throughout the complex march of the legislature one fact is noticeable, *viz.*, the attempt to supply a test for the corporate character of local institutions. Whenever it was asserted that a town existed as a juristic person a charter of incorporation was demanded as an evidentiary document. Thus in the middle of the 15th Century the Court of Common pleas held that the grant of a charter of incorporation must be implied to every town then in existence. In the 16th Century a select body personifies the burgesses. The personality of a borough was then definitely recognized. A select body of men acted for the town. That select body became a close corporation.

From the reign of Henry VIII to the Revolution many of the older charters were modified and new ones granted to perpetuate and make even closer the close type of the town corporation; during the 18th Century and specially in the reign of George III extending into the 19th—there was no improvement. “There is little reason to doubt that the form given to the governing classes as well as the limitation of the burgurship, during this period was adopted for the purpose of influencing the choice, or nomination of members of Parliament. By the Reform Act of 1832 fifty six of the nomination or rotten boroughs were denuded of the power to return members, thirty boroughs were deprived of one member each and two of two members; sixty four seats were distributed among other town populations, and the country representation was increased by sixty-five seats.”(1)

In 1835 the Commissioners of Municipal Corporations in England and Wales found 246 Municipal Corporations in England and Wales. These consisted of a Mayor, Alderman and Common Council, collectively known as the town Council. In the community was a body of free-men admitted to the franchise by vote of the close corporation. With few exceptions the corporations were making no effort to provide

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(1) Davis *loc-cit.*, p. 124.



efficient local government. They existed quite independently of the communities in which they were placed. The business of the corporation was transacted in secrecy. The choice of incompetent town officers resulted in careless performance of municipal duties. To remedy these defects the Commissioners recommended the enactment of the Municipal Corporations Act of 1835 providing "that so much of all laws, statutes, and usages and so much of all royal and other charters, grants and letters patent in force relating to the several boroughs or to the inhabitants thereof, or the several bodies corporate as are inconsistent with or contrary to the provisions of this Act, be repealed and annulled."<sup>(1)</sup> Another important effect of this Act was that all the boroughs assumed a uniform corporate structure and came to be designated collectively through the Mayor Aldermen and burgesses of the town. Local self government was effectually restored and when municipalities of England came to be reduced to harmony with the wider national government of England they were permitted to retain in most of the features the form that they had acquired during their development. The subsequent Acts have effected much alteration in the constitution and government of municipal boroughs. The Municipal Corporations Act of 1882 may be taken as a typical

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(1) Davis *loc-cit.*, p. 127.

statute defining the characteristics and legal position of Municipal Corporations.

According to this Act the legal entity known as the Municipal Corporation of a borough shall bear the name of the Mayor Aldermen and burgesses of the borough or in the case of a city the Mayor, Aldermen and citizens of the city. In all actions and prosecutions and in all deeds and agreements the name of the corporation as here given should be used. Certain rules have been laid down in the Act for the constitution of the Council of a borough and the Councillors are required to have certain qualifications. There are other details with regard to the management of municipal business, conduct of elections and various other provisions for borough rates and borough civil courts. It is not necessary to take up these in detail as the Indian Municipal Acts do not agree except in general features with these particular rules of English law. But I have shortly mentioned the English rules because they are the models for the Indian laws on more or less cognate matters. For a general discussion of the law of municipalities as illustrating the nature of juristic personality some concrete examples from the Indian Acts would be all that is required. The Bengal Municipal Act may be taken as a type of all Indian Municipal Acts.

With regard to the creation of municipalities the remarks of the Hon'ble Mr. Bourdillon

are worth noticing. "§ § 4 & 5 of the bill deal with a question of considerable importance, viz., the conditions under which the boundaries of a local area which enjoys municipal privileges under the Act can be varied, or a Municipality be entirely removed from the operation of the Act. As the law now stands a municipality once constituted cannot be abolished, nor can its limits be varied except upon the recommendation of the Commissioners at a meeting. Moreover, Municipalities wax and wane and several instances have been reported to Government of places which no longer fulfil the conditions which once entitled them to the benefit of municipal institutions. To meet such cases it is proposed to leave the power of the initiative to the Municipal Commissioners themselves, but a clause has been added empowering Government to abolish a municipality or vary its boundaries only when it clearly appears that it no longer fulfils the conditions laid down by the Act." (1) This shows that the modern law supplies at least one important case supporting the contentions of the concessionists. The sovereign as is clearly seen from the remarks quoted is empowered to take away the privileges of corporate personality when it thinks fit that an institution should no longer enjoy the benefits derivable from such personality. The state has created it and the state destroys it when

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(1) *Calcutta Gazette*, Feb. 14, 1894, Sup. p. 236.

necessary. The conception of immortality of a corporation has to be modified here.

The Act specifically says that the Commissioners shall in the name of their chairman by the description of the chairman of the Municipal Commissioners of....., be a body corporate and have perpetual succession and a common seal and in such name shall sue and be sued. So you see that the fundamental characteristics of a corporation are present in the case of municipal corporations. The provision regarding perpetual succession has this important consequence that the supercession and re-establishment of a corporation by the local Government has not the effect of extinguishing the old corporation (1) and creating a new one but simply the temporary suspension and revival of the old corporation. As a juristic person questions regarding *ultra vires* arise in connection with municipal corporations. Thus the Civil Courts in India are competent to enquire into and control the action of the Municipal Corporations when they have acted in excess of powers conferred on them (2). Again when it appeared that the Municipal Commissioners of Gauntur had conformed to the procedure laid down in law for the imposition of the profession

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(1) Mchamohapadhaya Ranga Charier v. The Municipal Council of Kumbakonam I. L. R. 29 Mad. 539.

(2) Brindaban Ch. Roy v. Municipal Commissioners of Serampore 19 W. R. 309.

tax on a person it was held by the High Court that the act of the Commissioners was *ultra vires*. There is nothing in the Bengal Municipal Act to prevent a ratepayer from seeking the assistance of a Court on the ground that an assessment by a municipality is *ultra vires* and consequently not binding on the person (1). *E.g.* an assessment of the tax under § 85, cl. (a) was made in consideration of the assessee's circumstances and property outside the local limits of the municipality it was held that the action of the Commissioners was *ultra vires* and liable to be set aside by the Civil Courts (2).

Certain provisions in the Indian Statutes regarding municipal administration and councils may be properly explained by reference to the English Municipal Corporations Act that has served as a model for the Indian enactment. According to the English law the Council in a borough should conduct the business of the corporation and the council should consist of persons having certain qualifications. The effect of this rule is to make the council, the ministers or agents of the corporation, but as Grant has pointed out, the council are neither *the* corporation nor are they in themselves a corporation. The Council is the governing

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(1) *Nabadwip Ch. Pal v. Purnananda Shaha* 3 C. W. N. 73.

(2) *Kameshwar Prashad v. Chairman of the Bhabua Municipality*,  
I. L. R. 27 Cal. 849.

body in the corporation (1). The English statute enacts as regards the Acts of the body “ that all acts whatsoever authorized or required to be done by the Council of a borough and all questions of adjournment, or others that may come before such council, may be done and decided by the majority of the members of the Council, who shall be present at any meeting held pursuance of this Act, the whole member present at such meeting not being less than one third part of the member of the whole council ; and at all such meetings the mayor, if present shall preside and the mayor or in absence of the mayor such aldermen or in the absence of all the alderman, such councillor as the members of the council then assembled shall choose to be the chairman of that meeting, shall have a second or casting vote in all cases of equality of votes ; and minutes of the proceedings of all such meeting shall be drawn up and fairly entered into a book to be kept for that purpose, and shall be signed by the mayor, alderman or councillor presiding at such meeting and the said minutes shall be open to the inspection of any burgess, at all reasonable times, on payment of a fee of one shilling : provided always, that, previous to any meeting of the council held by virtue of this Act a notice of the time and place of such intended

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(1) Reg. v. York, 2 Q. B. 850 ; See 1 Q. B. 963 also Grant *loc. cit.*, p. 357 note (g).

meeting shall be given three clear days at least before such meeting, by fixing the said notice on or near the door of the town hall of the borough; and such notice shall be signed by the mayor, who shall have power to call a meeting of the council as often as he shall think proper; and in case the mayor shall refuse to call any such meeting, after a requisition for that purpose, signed by five members of the council at the least, shall have been presented to him, it shall be lawful for the said five members to call a meeting of the council, by giving such notice as is hereinbefore required in that behalf, such notice to be signed by the said members instead of the mayor, and stating therein the business proposed to be transacted at such meeting; and in every case a summons to attend the council, specifying the business proposed to be transacted at such meeting, signed by the town clerk, shall be left at the usual place of abode of every member of the council, or at the premises in respect of which he is enrolled a burgess, three clear days at least before such meeting; and no business shall be transacted at such meeting other than is specified in the notice: provided always, that there shall be in every borough four quarterly meetings in every year, at which the council shall meet for the transaction of general business, and no notice shall need to be given of the business

to be transacted on such quarterly days ; and the said quarterly meetings shall be holden at noon on the 9th day of November, or if the 9th day of November shall fall on a Sunday, on the day following, and at such hour on such other three days before the first day of November then next following, as the council, at the quarterly meeting in November, shall decide ; and the first business transacted at the quarterly meeting in November shall be the election of mayor." (1)

A comparison with the rules regarding the mode of transacting the business of the municipalities in India shews that *mutatis mutandis* the English law applies in substance to India. Of course there are certain minor alterations with regard to the adjournment of meetings, the formation of quorum, powers of the chairman and the appointment of subordinate officers but in other respects the Indian law in this particular is not much different from the English one. Just as in England a business cannot be transacted unless a quorum of the members are present in a council meeting so here a quorum of at least one third of the entire member of commissioners is necessary for the transaction of any business. *E.g.* The Bengal Municipal Act lays down in §. 42 "No business

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(1) § 69 English Municipal Corporations Act, 1836 modified by the later Acts. See Grant *loc. cit.*, p. 357.



shall be transacted at a meeting of the commissioners unless such meeting has been called by the chairman or by a person signing a requisition, nor unless a quorum shall be present. A quorum shall be in any municipality, in which the commissioners are more than fifteen, five; in any other municipality a number being not less than one third of the entire number of commissioners."

As regards the adjournment of meetings the rule in Indian law is that if at the time appointed for a meeting or within one hour thereafter a quorum is not present the meeting shall stand adjourned to some future day to be appointed by the president and three day's notice of such adjourned meeting shall be given. The members present at such adjourned meeting shall form a quorum whatever their number may be. (1) From this it is obvious, as in the case of the English law, that the power of adjournment belongs to the whole body. In fact such a power is incident to every meeting of a corporate body and although the majority of members do not form the corporation and for that matter not even all the members, much less the council which is only a governing body yet the majority of the council represent the corporation and form the channel through which the corporation can

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(1) Bengal Municipal Act, § 42. *Abaji Sitaram v. Trimbak municipality*, I. L. R. 28 Bom. 66.

act there being no other provision in the Municipal Corporation Act, English or Indian, for the aggregate meetings of the whole corporation (1).

In the English statute the Council may delegate their functions. The Act says "It shall be lawful for the Council of any borough to appoint out of their own body from time to time, such and so many Committees either of a general or special nature and consisting of such number of persons as they may think fit, for any purposes which in the discretion of such Council would be better regulated and managed by means of such Committees: provided always that the acts of every such Committee shall be submitted to the Council for their approval" (2). As the Council is a very fluctuating body and it has no attribute of the corporate character belonging to itself as a body, unless the statutory one of being bound by its majority, and consequently has no perpetual identity sometimes questions arise as to whether orders passed by one Council with regard to certain matters can be quashed at the instance of a Council subsequently elected. In order that complications might be avoided especially with regard to orders for the payment of money legislative measures have been passed whereby such orders are expressly

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(1) Reg v. Grimshaw, 10 Q. B. 755.

(2) § 70. The English Municipal Corporations Act.

excepted out of the general enactment to the effect that the acts of one Council cannot be regarded as the acts of its successor. So the delegation of powers by a Council does not give rise to any complexities. The ordinary rule regarding the principal and agent applies, the maxim to be remembered being *delegatus deligetare non potest*.

Perhaps the most important function of the representative body in a municipal corporation is that of making bye laws. According to the Bengal Municipal Act the Commissioners of any municipality may from time to time at a meeting which shall have been convened expressly for the purpose and of which due notice shall have been given, frame such bye-laws as they deem fit, not being inconsistent with this Act or with any other general or special law for regulating traffic, and for the prevention of obstructions and encroachments and of nuisances on or near roads; prohibiting the letting of fire-arms, fire-works, fire-balloons or bombs, except with the permission of the Commissioners or a member of the ward committee or a municipal officer empowered by the Commissioners in this behalf and on payment of fees at such rates as may be sanctioned by the Commissioners at a meeting; regulating the use of and the prevention of nuisances in regard to public water supply, bathing and washing-places,

streams, channels, tanks and wells; regulating the disposal of sewage, offensive matter, carcasses of animals and rubbish and the management of privies, drains, cesspools and sewers; regulating cremations and burials and the disposal of corpses; preventing nuisances affecting the public health, safety or convenience and giving effect to the objects of this Act; and may by such bye-laws impose on offenders against the same such reasonable penalties as they think fit." The first observation arises on the general powers conferred on the Commissioners by this section. At first sight it may be thought that for the purpose of making bye-laws all the Commissioners should be present. This view, moreover, squares with the general doctrine regarding the power of a corporation to make bye-laws. Because as you remember the power of making bye-laws is *primâ facie* incident to the whole corporate body and in the case under consideration the Commissioners together with the Chairman form the body of the corporation. But the rule just enumerated must be read with another defining the quorum for the purposes of transacting the business of municipalities. The quorum consists of one-third, and for some special objects two-thirds of the whole number of Commissioners. Therefore for making bye-laws it is not necessary that all the members of the corporation should be present. The bye-law may be passed by

any majority of the quorum but every one of these must take part in the proceedings and vote one way or the other in order to make a valid bye-law. This is made perfectly clear in the English Statute as Grant points out. According to him it would seem impossible to consider that the legislature meant, by requiring the presence of two-thirds (the quorum in English law) that that proportion should be merely present and that it did not signify whether they all voted or not (1). The object seems to have been to secure for every bye-law the sanction of so large a proportion of the Council as would give it unquestionable weight and authority with the community at large, and that object would only be colourably and delusively carried out, if councillors might be present in order to make up the member, but need not take part in the proceedings (2).

A question might be asked as to whether a bye-law passed by the Commissioners comes into effect forthwith. The English law differs as to this matter from the Indian law. According to the former a bye-law comes into force after "the expiration of forty days from the date of its passing and after a copy thereof shall have been sent sealed with the seal of the said borough, to one of His Majesty's principal Secretaries of State, and shall have been affixed

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(1). *In re Ratepayers of Eynsham Parish*, 18 L. J. Q., B. 210.

(2) Grant, *loc. cit.*, p. 364.

on the outer door of the town hall or in some other public place within such borough.” (1) According to the Indian Act no bye-law is effective unless and until it has been submitted to and confirmed by the Local Government and unless notice of the intention to apply for confirmation “has been given in one or more local newspaper circulated within the Municipality before the making of the application or if there be no such newspapers then in such manner as the Commissioners may direct and unless a copy of the proposed bye-laws has been kept at the office of the Commissioners for one month at least before making any such application and has been open during office hours thereat to the inspection of the inhabitants of the Municipality to which such bye-laws relate, without fee or reward.” (2) You see that although in English as well as in Indian law a bye-law has to wait for a certain period before it becomes operative yet there is a fundamental difference between the two systems whereby the apparent similarity is outweighed by a radical dissimilarity, while in English law the Council has a delegated authority to make bye-laws and is consequently a legislative sovereign of a particular type, the Indian law does not make the Commissioners a sovereign legislative body in any sense. The

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(1) The English Municipal Corporations Act, § 90.

(2) The Bengal Municipal Act, § 351.

Austinian test of a bye-law is therefore rigorously applicable to a bye-law of an English Municipality and not to that of an Indian one. This distinction should be carefully borne in mind and no attempt at generalisations based on English rules should be made while Indian Municipal bye-laws are discussed. This note of warning is necessary as some of the judges in India have attempted to graft the English peculiarities of bye-laws on the bye-laws of Indian quasi-legislative bodies. That such attempts are bound to be futile becomes apparent on reading the judgments of some of the judges of the Indian Courts on the essential characteristics of bye-laws, *e.g.*, in a Madras case the judge discussed at length the principles on which all bye-laws should be construed and quoted Mr. Justice Channel in support of his observations but failed to point out that the bye-law in India stood on an altogether different footing from that of its English prototype. Such a hasty generalisations cannot be of any service.

We may take up some of the Indian cases referring to certain points in the Indian Municipal Acts. These would be quite sufficient for all that is required in a general survey of the characteristics of municipal corporation in India :—(1) The Chairman, Municipal Board Chapra *v.* Basudeo Narayan Singh (37 Cal., p. 374). This relates to § 116 of the Bengal

Municipal Act which says "No objection shall be taken to any assessment or rating in any other manner than in this Act as provided." According to the implication of this section the decision of the objection committee in matters regarding the amount of assessment is final and the Civil Court has no jurisdiction to interfere in such matters. Here a ratepayer sues to have his municipal assessment reduced as illegal and *ultra vires*. The previous assessment of his holding was Rs. 6-8 and now it has been raised to Rs. 18. This assessment is illegal for two reasons (a) since the previous assessment no alteration or improvement has been made on the holding (b) the assessor in making the assessment did not personally inspect the house but relied on the report of the tax darogah. The defence is that the assessment is not bad in law or *ultra vires* and § 116 Bengal Municipal Act is a bar to such a suit. The Munsiff dismissed the suit but the Sub-judge reversed this decision and against this judgment the municipality is appealing. In the High Court the judges held that the municipality have the power to make a fresh assessment every three years and that the Civil Court has no power to revise the valuation but is bound to accept it as conclusive.

This shows that within certain limits the legal capacity of a corporation is fully defined by the statute and the theory of juristic persons



must be modified in such cases by reference to the exact words of the legislature. Of course there is nothing contrary to the general view regarding the legal position of a corporation in the provisions of the Indian statutes referred to, because even according to the abstract theory the rights and duties of a juristic person are the creatures of the legislative systems of particular places. The content of the juristic capacity must therefore be determined by technical rules. The abstract theory is in such a case bound to be supplemented by considerations relative to concrete facts. (2) An important provision in the Calcutta Municipal Act is connected with the conditions of liability for non-feasance especially when the latter amounts to a quasi-criminal offence. The corporation as a juristic person has certain special powers conferred on it in order that its position may be as stable as possible. Thus § 341 says "Where any fixture has been attached to a building and causes an encroachment over any public street the general committee may require the owner or occupier to remove it." It is evident that the legal position of the corporation demands that the juristic person should be preferred over the individual persons in such cases. That is why a general power is given to a corporation to enforce certain rights even to the detriment of the interests of an individual. Sometimes the non-compliance

with a requisition made by the corporation entails a criminal liability. So in *Sarat Chandra Mukherjee v. The Corporation of Calcutta* it was remarked that § 574 of The Calcutta Municipal Act might make a non-compliance with a requisition under § 341 an offence. The object evidently in all cases where like provisions obtain is to secure the maximum stability to a corporation with the minimum inconvenience to the people. (3) Just as a municipal corporation has external powers necessary for its stability so it has internal powers required to unite the separate parts of its body in order to make it proof against quick dissolution. Thus in the Calcutta Municipal Act there is no provision whereby the general committee of the corporation may be hindered from carrying out a measure necessary for the safety of the corporation. The Chairman has the right to reject or approve any plan submitted and an appeal may be made to the general committee whose decision is final. The corporation as a whole has no jurisdiction to approve or reject any plan. Some have asserted that such a rule is a characteristic of a paternal system of legislation and directly militates against the modern *laissez faire* basis of legislation. But it must be observed that where it has been proved that some amount of control is necessary for the maximum of safety even the most communal form of legislation has allowed a

select body in a class a full control over the class for the interests of the latter. The rule under discussion and like rules in other systems are simple corollaries of the maxim—the safety of the state overrides the safety of the individuals.

A question of rather frequent occurrence in this connection is whether a liability attaches to the corporation as a whole or to the general committee for a mis-feasance attributable to the juristic person. The Calcutta High Court has decided in *Bholaram Choudhury v The Corporation of Calcutta* (36 Cal, p. 671) that no action in the nature of a mandamus lies against the corporation to compel them to approve any plan for making additions and alterations to buildings. The plaintiff's remedy in such a case is against the general committee or chairman under § 45 of the Specific Relief Act. In this case after the opening of a new road called the Harrison Road the corporation had at its disposal surplus lands, *i.e.*, lands acquired outside the alignment of the proposed Harrison Road which were intended to be sold at a profit on the completion of the road. A portion of these lands was known as number 199 Harrison Road. This land the corporation sold to one Sadasuk Kotmi who applied for sanction to build upon it and submitted a plan. Pending the sanction Sadasuk Kotmi conveyed the land to the plaintiff the sanction was given

in due course and then the plaintiff applied for the sanction to make certain additions and alterations. This sanction was refused by the corporation and the plaintiff applied to the general committee who also refused the sanction. The corporation alleged that the plaintiff's building was a domestic building or dwelling-house and as such was subject to the rules and regulations of the Municipal Act. Plaintiff therefore sues (1) for declaration that the refusal to give sanction was irregular, illegal and wrongful (2) for injunction restraining the corporation from demolishing portions of the plaintiff's buildings. Fletcher, J., observed in course of his judgment that the Corporation "which is the largest municipal authority has certain specific duties allotted to it under the Act. They depend on § 14 chiefly. The general administration of the Act is vested in the chairman appointed by the local government. Certain duties are cast on the general committee. That body is constituted under § 9. Each of the three authorities is independent of the other. In certain respects one requires the sanction of the other to do the acts authorized. It is true that the only body constituted a body corporate is the corporation. That is a body consisting of the chairman and fifty Commissioners elected and appointed. The chairman and the general committee have control with regard to the approval or refusal

of plans under the building regulation set out in Schedule 17. Section 371 provides 'permission to erect or re-erect a masonry building shall not be given unless and until the chairman has approved the site on an application sent to him under § 370.' The section 375 provides 'whenever the chairman refuses to approve a building site for a masonry building or to grant permission to erect or re-erect a masonry building he shall state specifically the grounds for such refusal and the applicant may appeal to the general committee against such refusal.' Sub-section 2 provides—the decision of the general committee shall be final. Sub-section 3—if the general committee reject any such appeal they shall by written order specifically state the grounds for such rejection. Section 377 gives the grounds on which approval of a site for the erection or re-erection of a masonry building or permission to erect or re-erect a masonry building may be refused. It is important to call attention to § 95, which provides for a hearing by the sub-committee of an appeal from the chairman for approval of the building plans subject to confirmation by the general committee. In this Act there is no provision express or implied which gives the corporation of Calcutta any control over the general committee in matters specifically delegated by the Act to the general committee. This Act confers the right to approve or reject

plans on the chairman. Appeal is to the general committee and that body's decision is final, no appeal lies to the corporation." Thus you see that for the safety of the whole corporation a part which serves mainly as an executive organ is invested with authority which *primâ facie* should belong to the juristic entity itself. Such instances are not singular in corporation law. They are consequences of the doctrine that rules the formation and the juristic capacity of all bodies corporate. The fiction theory has in these cases met with strong opposition. It has been wanting in the very constructive basis that would support practical rules of the kind just noticed. The legislature has intended that for practical purposes the juristic person should fulfil as many conditions as are required for performing the juristic functions under contemplation. The entity is here fully "objectified."

(4). A point of importance is that a municipal corporation should act just like any other individual when exercising a statutory power in strict conformity with the rule. A juristic person is in this respect on the same level as an individual legal person. As an example may be mentioned the matter of Jogendra Nath Mukhuti and others (36 Cal., p. 271). According to § 556 of the Calcutta Municipal Act the corporation has the power to lease any property vested in them on any

terms they think fit without previously calling for any tenders : but the form of a lease cannot be given to a transaction which properly falls under § 88 of the Act. Although a covenant in a lease or in respect of a lease is in a sense a contract, if it relates to the demised premises and is not independent of them it does not fall within the purview of § 88 of the Calcutta Municipal Act and it is not obligatory upon the corporation to call for tenders in respect of such a contract. In this case certain lands and tenements at Dhappa called the Dhappa Square mile were vested in the corporation and had been used by them for a considerable number of years for depositing there the refuse of the city, a portion of these lands was leased to one Bhabanath Sen in 1829 and the next year the remaining portion for 19 years. This lease was renewed in 1889 for another 10 years ending in December 1909. There was also a separate agreement with Bhabanath Sen for unloading the municipal refuse wagons at the square mile, the corporation undertaking to pay Rs. 42,000 per annum. In 1906 Bhabanath Sen submits schemes for improvement of the square mile and fisheries attached to it. A special committee was appointed to consider the schemes and also to consider the question of the charges of unloading the refuse wagons. Offers came from others besides Bhabanath Sen including an application from Jogendranath Mukhuti.

The special committee rejected all these offers and decided finally that no tenders should be invited. Then at the instance of the special committee the chairman recommended to the corporation to combine the lease with the contract of unloading and to grant the lease to Bhabanath for another 22 years on his undertaking to charge nothing extra for the unloading and this recommendation was carried out. Thereupon Jogendranath Mukhuti with two other ratepayers questioned the refusal to invite tenders as *ultra vires*. Woodroffe, J., observed that this was an application for an order in the nature of a mandamus to compel the corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the special committee appointed by it to consider the matter. "The corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same man on the recommendation of the select committee. The applicant objects to this being done and says that the proposal of the select committee cannot be accepted without first calling for tenders. If there is a discretion in the matter then the corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest.....The point of law involved here is this :—Is the discretion of the corporation



controlled by the provision of § 88 of the Municipal Act which requires that in the case of contracts for the execution of any work involving the expenditure of over Rs. 10,000 tenders should be called for. Had there been simply a contract for the unloading of the refuse at a certain charge then no doubt that section would have applied. This is not disputed. But the proposal here is that Babu Bhabanath Sen should do the work without charge as a term and condition of a lease of the square mile which is granted to him upon this and other considerations. Section 556 enables the corporation to lease any property vested in them (and the square mile is so vested) on any terms they think fit. No tenders are required before the property is leased. No doubt an agreement for a lease is a contract although the lease when completed is a conveyance. Further a covenant in the lease is a contract and in this sense the covenant in respect of the lease is a contract. The question, however, is whether it is a contract within the meaning of § 88 and governed by it. Of course the law cannot be evaded by giving the form of a lease to a transaction which properly falls under § 88. The covenant relates to the demised premises and is not independent of them. The refuse is unloaded into the square mile with a view not only to the disposal of the former but the reclamation of the latter. The covenant and

the lease are therefore closely related to one another. Thus the present case is not governed by § 88 and so it is not obligatory upon the corporation to call for tenders." The judgment makes it perfectly clear that statutory powers are to be exercised by a corporation in strict accordance with the spirit of the statute. The incorporating Act has supplied the Indian corporations with a code and it is the object of the legislature that the corporations should strictly adhere to the terms of the code. So you see a parallelism obtains between a juristic person and a natural person so far as an important aspect of legal capacity is concerned. (5) As the municipal corporations have mainly been created for local purposes, especially for promoting the economic welfare of different places commissioners have mostly been authorized to close temporarily any road or part of a road for the purpose of making, repairing, or closing highways or for constructing any sewer, drain, culvert or bridge or for any other public purpose. The commissioners, however, perform their duties for the safety of passengers only and must not put any obstruction naturally dangerous. Thus in the case of the Corporation of Calcutta v. Anderson (10 Cal. 455) the High Court held that although the statute imposed an obligation on the commissioners to repair and maintain the roads and they were liable for a breach of their statutory duties, yet if in

performance of such duties they put a dangerous obstruction they were equally liable for damages caused by it. It appears therefore that the executive body of a corporation cannot plead in defence a statutory rule which does not directly authorize an unlawful act. In this respect the corporation is no better situated than a single individual. The group person simply because it is a juristic person is never allowed undue privileges in any legal system.

The last topic for consideration is the one which according to some should come at the very start of the subject of municipal corporations viz., the constitution of the municipality. But I have taken this at the end because stress is to be laid, in a general discussion, on the peculiarities of the specific juristic person rather than on the origin and creation of this person. Here we are concerned with certain definite rules regarding the formation of the municipality. These rules have been modelled more or less on the English statute regarding municipal corporations in the United Kingdom (32, 33 Vic. Chap. 5 § 1 &c). The most important of them refers to the method of electing commissioners, (it must be remembered that the commissioners together with the chairman form the corporate body). The persons who can vote may be compared to the burgesses on the English electoral roll. Certain property qualifications are necessary in order

that an individual may be qualified to vote in an election of a commissioner, *e.g.* The Bengal Municipal Act § 15 says "For the purposes of the election of commissioners the local Government shall lay down such rules not inconsistent with the provisions of this Act, as it shall think fit, in respect of the division where necessary, of each municipality into wards, and the number of commissioners to be elected for each of such wards, the qualifications required to entitle any person to vote for a candidate for election and in respect of the mode of election and the authority who shall decide disputes thereunder." As a sample rule specifying the qualification of voters may be mentioned the rule no 2 in the Bengal Government Notification No. 4345 M. 21st November 1896:—Every male person shall be eligible to vote who has attained the age of 21 years, has been resident within the limits of the municipality for not less than 12 months immediately preceding the election, has been duly registered as provided in rules 4 to 12 inclusive and who (a) has during the year immediately preceding such election paid an aggregate amount of not less than Rs. 1-8 (Rs. 3 in Howrah and Cossipore and Chitpur) in respect of any or more of the rates specified in § 15 of the Act or in respect of the fees for the registration of carts under § 143 of the Act or (b) has, during the year aforesaid paid

or been assessed to the tax imposed by Act II of 1886 or (c) being a graduate or licenciante of any University or having passed the first Arts Examination of the Calcutta University, or the corresponding standard of any other University or holding a license, granted by any Government Vernacular Medical School to practise medicine or holding a certificate authorizing him to practise as a pleader or as a mukhtear or as a Revenue agent—occupies a holding or part of a holding in respect of which there has been paid, during the year aforesaid, in respect of any rates specified in § 15 of the Act, an aggregate amount of not less than Rs. 1-8 (Rs. 3 in Howrah and Cossipore—Chitpur) or (d) has during the same period, paid not less than Rs. 20 as rent in respect of the occupation by him of a holding or part of a holding which is assessed with the rate under § 85 cl. (b) of the Act.

This rule bears a close similarity to the rule in § 1, 32 and 33 Vic. Chap. 55, only certain changes have been made in order to comply with the Indian requirements. The analogy is not accidental because as I have already mentioned the Indian legislature has taken the English statute as the original best suited to supply a copy for India. But the essential fact is to be borne in mind that in India the historical condition that has affected the growth of municipal corporations in England has been

wanting. The result is the absence of a natural desire for perfecting the extra legal corporateness into a fully legal one. In England that desire was working out in the presence of natural corporations such as County Councils, Parish Councils and District Councils. In India the old village communities did not and perhaps could not meet the modern wants. Consequently the municipal corporations of the present day have appeared in answer to a demand for civic corporations. The municipal corporation has come into being fully developed and has not been so much a subject for abstract theory as an accomplished fact.

So much for the municipal corporations in India.\* I pass on to the Indian Universities as illustrating the special characteristics of a very important class of corporations.

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\* Dr Redlich has raised an important question in connection with the relationship between the permanent or semi-permanent executive of paid officials and the changeable Committee of unpaid Commissioners in a municipal corporation. The practical import of the problem is very great on the continent. It may be interesting to compare the methods by which it has been solved in Germany, Austria and India. But as the discussion on this point would entail a fuller knowledge of the politico-legislative questions of continental Europe it is not possible to enter into it in the present course of lectures. Those who are interested in this topic may refer to the English translation of Dr. Redlich's famous treatise on the Local Government in England.

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## LECTURE XI.

### Universities.

The educational corporations come next to the Municipal Corporations in importance. So far as India is concerned, the universities, which are the only educational corporations in this country, are regulated by a law wholly foreign in principle; because the indigenous educational institutions did not grow into corporate bodies in the strict technical sense of the term. While the whole of the law of corporations is exotic, the rules that apply to the Universities in India seem to have a greater impress of foreign influence. To get a fairly comprehensive idea of the growth of universities into corporations it is necessary to go back to the time when in Europe the Roman power was exerting a posthumous influence. "On the demise of the institutions of the Western Roman Empire," says Dr. Davis, "the preservation of the remnants of Greek and Roman learning and the feeble maintenance of education were left as a heritage of the Church and especially of its bodies of monks. Unromanized Christianity and Roman learning found a common refuge; some of the monasteries, like that of Viviers, founded by Casiodorus, appear to have been devoted rather to

the ends of learning than to those of religion. Even the municipal schools that survived in Italy and in southern France, where Roman institutions had taken root most firmly north of the Alps, succumbed to the Frankish invasions and left to the monks such part of the field as they had not previously occupied. The Benedictine re-organization opportunity gave an impetus to monasticism at the beginning of the sixth century, even before the barbarian migrations had ceased; in the convents based on the Benedictine rule was the sole refuge of learning from the sixth to the ninth century, or until the re-action in the Church by which on the one hand the regular life of the monasteries was introduced into cathedral chapters, and on the other, the monasteries were transformed into cathedrals. In both monastery and cathedral, however, education was long intended solely to qualify monks and canons for the performance of their religious duties and not to raise the general level of learning in society. As the life of convent or chapter was lived as an end in itself, so learning, subordinated to that life, found no wider purpose. It was only at the beginning of the 9th century that the larger monasteries made a distinction between the *oblats* and outsiders in their schools. . . . . Neither the monastery nor cathedral schools had a district organisation, the *scholasticus* was merely one of



the monks or canons or occasionally some outsider employed by them, whose duty it was under the direction of the abbot or chapter to instruct the group of scholars made up of both *oblats* and outsiders."

It is a long history how through the influence of Alcuin who was put in charge of the place-school by Charlemagne important reforms in educational methods were introduced leading to the development of university life on the continent. It is not necessary for our purpose to go into the details of the origin of continental universities. But some knowledge regarding the growth of the English universities is necessary in order to understand the relation between the English and the Indian Universities as Corporations. This is all the more necessary because, as I have already said, the Indian Universities are nothing but copies of some of the English ones.

At common law "when universities were spoken of, the universities of Oxford and Cambridge were uniformly intended, and their degrees were alone recognized in the Courts as conferring civil or ecclesiastical rights and privileges." (1) Although later on degrees of the universities of Durham, London and Dublin were taken notice of as conferring certain privileges yet the term *Universitas* when

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(1) Grant, *loc. cit.*, p. 515.

originally adopted denoted the Universities of Oxford and Cambridge as Corporations not of Colleges, but of Matriculated Members. It is useful consequently to have some knowledge of the origin of the Oxford University as typical of all universities in the middle ages in England. No better guide than Dr. Rashdall can be found to this topic. I shall summarize the pertinent portion of his *Universities in Europe in the middle ages*.

Sometimes in the 13th century the University of Oxford took up the course of the development of learning and education at the point to which the University of Paris had already carried it. Leaving out of view the participation of the University of Oxford in the general university movement in Europe we may consider the internal relations alone, because the latter touch our subject closely. A corporation is distinguished from a mere class or order chiefly by the internal system of relations between its component members. A group of persons as a corporation must have such governmental machinery that its group unity may be assured and the objects of its existence may be attained. According to this test even in 1214 when the Legative Ordinance conferred substantial privileges on the masters and scholars of the University of Oxford the latter was not a full corporation, because the ordinance was not addressed to the university but

to "the burghers, Bishop and all the faithful in Christ." The Chancellor was then an agent through whom the Church directed and regulated the activity of the members of the university. The group had not yet fully crystallized into a separate entity. A certain connection, although loose, existed between the Church and the University. It was at the end of the 13th century that the constitution of the University was substantially settled. The system of government was as follows—(1) when the regent Masters of Arts met in a body for the purpose of transacting matters relating to their department, they were known as the congregation of Regents in Arts or more familiarly the Block Congregation. (Those masters who actually lectured were called regent-masters or regents, those who did not lecture were called non-regent masters or non-regents). They elected the two proctors of whom the senior presided over their body when in session, though both were executive officers of the whole university, one of the most important of their duties was the celebration of inceptions in Arts. Constitutionally more important, they had the authority to entertain a preliminary discussion of proposed statutes intended to bind the whole University; they were called the previous congregation when they assembled for this particular purpose. (2) Above the first body was a congregation of the

regents of all the faculties called the Lesser-Congregation. It was virtually the legislature of the University. It elected the Chancellor. Technical educational matters relating to the work of lecturers and scholars and the conferring of degrees were considered by it. (3) The third body was the congregation of all regents and non-regents called the Great Congregation or Full Congregation. The Lesser-congregation was the ordinary legislature of the University while the Great-congregation was a constitutional body, it alone had the power to pass a permanent statute. It also acted on some matters specially reserved for it.

By degrees the University as a corporation was separated from the constituent colleges each of which became a corporation in its turn. From the extant records of early collegiate life it appears that the scholars of Oxford lived in the houses of townsmen or in small groups in hostels or halls. The lectures to which they listened were delivered in schools rented by the masters and doctors. There is good reason to believe that the several hostels or halls occupied by scholars having common sympathies due to their common nationality or parochial interest grew into several corporate bodies that came to be known as colleges. The University asserted its authority over the colleges. Thus the University as a big corporation contained within itself the smaller corporations—the

colleges. A college constituted of the visitors, the head, the fellows, the scholars, the almsmen, the commoners, the lecturers and the chaplains. The visitor was virtually the successor of the founder and had the power to investigate the affairs of the college at any time, to ascertain whether the statutes were being faithfully observed, to compel compliance with their terms, to receive newly elected heads into their office and to remove heads if on complaint of the fellows they should be found useless or negligent or luxurious or vicious, or more generally if their retention in office would be detrimental to the welfare of the college. The head of the college variously called warden, master, provost, president or rector, was elected by the fellows or a select number of them though not necessarily from their own number. He was required to be in holy orders but was to lose his office on the acceptance of a benefice or the acquisition of an independent income. He presided over the fellows although later on he became somewhat more remote from the fellows and lived in a separate house deputing many of his functions to a sub-warden or vice-president or dean. The Fellows originally named by the founder constituted a close body, statutorily limited in number to from ten to seventy members, filling their vacancies by co-optation and devoting themselves to the particular studies prescribed

by the statute. The scholars were like the Fellows limited in number and came by preference from particular countries or parishes. They were undergraduates admitted on probation for a year after an examination by a college examiner to determine their admission or rejection, and held their scholarships for a limited period or until they should have taken their degrees. In some colleges they were preferred in the election to vacant fellowships. The lecturers, readers and tutors were persons supported on definite stipends paid from the college revenue and they had the charge of the education and instruction of the inmates of the colleges. The religious side of the college required the presence of chaplains. The chaplains were elected by the fellows or appointed by a bishop or a dean and chapter with their consent. In general the chaplains owed their office to the choice of some authority outside of the collegiate body.

The universities although composed, as to greater parts, of clerical corporators are nevertheless not to be regarded as ecclesiastical corporations, they are lay corporations and the crown cannot take away from them any rights that have already subsisted in them under old charters or prescriptive usage nor grant them new charters without their voluntary acceptance. That the courts have treated them as civil corporations appears from the fact that

in the reign of Edward VII a mandamus went to the Chancellor of the University of Cambridge to allow Robert Baketon to take his degree. Again in the reign of Edward III a mandamus issued to the University of Oxford to remove a Lollard from a scholarship in that University.

Before coming to the Indian Universities it may be worthwhile to mention some of the legal characteristics of the English Universities.

The first point to note is that a person becomes a corporator of the University by matriculation but he becomes a corporator of a college when he is elected a scholar or fellow or master of the college, because the University as a corporation is not co-extensive with the group of colleges regarded as separate corporations. The Universities of Oxford and Cambridge were incorporated by charters from the crown at a very early date and by 13. Eliz. Chap. 29 they were re-incorporated with their ancient privileges, liberties and franchises. Sir Edward Coke says "by this blessed Act of Parliament, all the courts, franchises, liberties, privileges, immunities, &c., to either of the said Universities, that they might prosper in their study with quietness, are established, made good and effectual in law against any *quo-warranto*, *scire facias* or other suits or any quarrel, concealment, or other opposition

whatsoever." (1) Grant observes that another Act of Parliament enabled both Universities to imprison for incontinency and on that Act rested chiefly the power in that respect which was exercised at one time by the proctors and pro-proctors. Dyer mentions (2) that one of the two charters of Queen Elizabeth gave to the University of Cambridge large powers over public women as to removal coercion, regulation, &c. These powers are now rarely exercised except in the case of members (not being masters) who have been guilty of crimes or enormous moral delinquencies. The undergraduates are generally banished from the University for serious breaches of discipline or offences against the University statutes.

An important question of Corporation law is connected with the visitation of the Universities. How are the Universities kept within the limits prescribed to them by the law? In general "the founder and his heirs and in default of heirs the Crown is the visitor of all Corporations which have been established with an endowment for any purpose which the law calls eleemosynary, which includes schemes for promoting education, by holding out to all future generations certain advantages, facilities and privileges, upon repairing to these institutions, towards which the proceeds of the

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(1) 4 Inst. 227.

(2) 1 Privilege of the University of Cambridge 125.



endowment are appropriated more or less exclusively. Now it is the rule that in all cases except where the founder himself has otherwise provided, the visitorial power attaches to and is inseparable from the founder-ship that is to say the founder and his heirs are always visitors of his foundation, their province and duty being to see that the institution conforms to the rules and regulations that the founder has laid down, called in this case, statutes, and to maintain order generally, but not to take cognisance of offences which are such by Act of Parliament or the Common law independently of the statutes.”(1) At one time it was doubted as to whether the Universities were visitable by the Queen’s Bench or King’s Bench but it seems now to be the settled rule especially in the case of the University of Cambridge that the visitor is the King’s Bench and not the crown. Thus in *R. v. Vice-Chancellor of the University of Cambridge* (3 Burr. 1647) it was decided that a mandamus would issue to the keepers of the Common Seal of the University of Cambridge to compel the affixing it to an instrument of appointment of a University officer pursuant to a grace of the Senate. In another respect it may be said that the crown has the visitorial powers even now. Formerly the sovereigns especially the Stewarts were in the habit of enforcing their powers

(1) *R. V. St. John’s College Cambridge* 4. Mod. 233.

over the Universities without question. Thus Grant mentions that Charles II by warrant Dated Oct. 30, 1679 dispensed partially with the statutes of the foundation of Lady Margaret's preacher in the University of Cambridge by ordering the University to alter the form of oath imposed upon the preacher. (1) But now a days the crown would probably interfere only in exceptional circumstances ; *e.g.*, in questions regarding alteration of educational schemes.

The practice seems to be nearly settled that the coercive and controlling power over the Universities resides in the Crown, to be exercised by and through the King's Bench in ordinary cases of common law rights. Offences against University statutes are not cognisable as such by the courts of law, or justices of the peace nor are they offences against the crown so as to be pardoned by an act of grace. According to the statute 13. Eliz. C. 29, already mentioned all injuries and trespasses against the peace excepting treason, mayhem, and felony are triable in the University of Oxford or Cambridge by the Lord High Steward or His deputy ; But the power has not been exercised in either University for a long time.

The courts which under the statute take cognisance are called the Chancellor's courts

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(1) Grant, *loc. cit.*, p. 518.

or more commonly the Vice-chancellor's courts because they are practically held before him and his assessor. These courts are courts of record. In the University of Oxford an appeal lies "from the sentence of the Vice-chancellor to delegates appointed by the congregation; and from thence to other delegates of the House of convocation; if these all agree, their sentence is final, otherwise there was a further appeal to the crown in chancery who named delegates to hear the appeal, now the Judicial Committee of Council. With respect to the chancellor's court of the University of Cambridge, its proceedings are examinable in the court of King's Bench and upon its appearing to the court of King's Bench that the court below has exceeded its jurisdiction, or acted erroneously within the limits of such jurisdiction, a mandamus will issue to compel them to do justice to the injured party or a prohibition according to circumstances, and so of the chancellor's Court of Oxford; the rule is that prohibition always may be had where the court usurps jurisdiction."

It is necessary to observe that the two English Universities have somewhat different jurisdictional powers: The jurisdiction of the chancellor's court at Oxford extends to personal actions throughout England in which any of its members are sued; while the jurisdiction of the Chancellor of Cambridge extends only to

such personal actions as arise within the town and suburbs. Again in the case of Oxford the privileged person must be resident within the University. The only mode in which that court can assert its privilege is by discommoning a person who sues a resident member of the University in one of the King's courts. The person discommoned is debarred from trading and maintaining intercourse with the members of the University. Thus in the Chancellor of the University of Oxford (I. Q. B. 952) a plaintiff who had sued a resident member in the Queen's court was called to appear in the Chancellor's court for having brought such an action. He neglected to put in an appearance. The Chancellor's court proceeded of its own authority to adjudge that he should stop all proceedings and pay all costs and that on default he should be arrested. But it was held that the Chancellor's court had no legal authority to do this although the penalty in the method contemplated would have been less than that of discommoning.

"In Oxford the privilege of being sued in the Chancellor's court for causes within its competence, arising within the precincts, extends to the servants and ministers of the University and of the colleges and scholars, provided such servants are matriculated and resident within the precincts; but when one of them is sued along with members of the

University, it is not always necessary to prove that he is matriculated or resident.

With respect to the privilege of servants in Cambridge, but little is to be found in the books. In *Carrell v. Parke* the defendant in an action on a bond purporting to be made at C in the country of Surrey pleaded the privilege of the University granted by Queen Elizabeth for scholars &c and their servants upon contracts made within the University and showed that the bond was made in Cambridge and that he was a servant of the scholars, to wit, bailiff of King's college in that University. The report says "it seems that the defendant being a bailiff of the college is not capable of the said privilege. But where a servant or other privileged person claims his privilege by way of plea to an action for a trespass, alleged to be committed out of the jurisdiction of the University court, he ought to conclude with the special traverse, without this, that he was culpable in any place without the University of Cambridge.

The jurisdiction of the University courts does not extend to the cases where the Chancellor or the Vice-chancellor is himself sued, though along with others of the University : for no one but the king (it is said) shall be judge in his own cause and king only through his judges ; nor to cases where the officers of the Courts at Westminster are plaintiffs ; but the

Chancellor in former times appears to have claimed cognizance of an indictment against his Commissary for striking one of the marshalls of the king coming to execute his office within the University." (1)

There are certain other special powers granted to Universities *e.g.*, the power of presenting to the livings of papists &c. which need not detain us here. The next important eleemosynary corporations are the colleges in the English Universities. These colleges must be distinguished from their Indian representatives. In our country the colleges are merely educational institutions affiliated to the universities and not corporations in any sense. But the colleges that we are considering are in general corporations incorporated under the name of the master, fellows and scholars of a college. The head as already noticed is variously styled the president, the principal, the provost or the rector but commonly the master *e.g.*, the head of the Trinity College Cambridge is known as the master, so is that of St. John's, Christ's, Jesus, Cambridge. The head of the King's College Cambridge is called the provost, that of the Queen's College Cambridge is called the president, the head of Lincoln's College Oxford is called the rector while some of the heads of colleges in other parts of Great Britain are called principals.

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(1) Grant *loc. cit.* p. 523.

Just as in the case of Universities the colleges in England have generally visitors for the most part appointed by the founders. The visitatorial powers lie in the appointee and his successors. In case of failure of the latter it results to the King who has to exercise the powers *cy pres* to the manner in which they were exercised before. The colleges in the Modern Universities differ somewhat from those in the older English Universities; they have only formal visitors that is to say the authority to inspect them and to regulate their behaviour does not necessarily lie in the visitor in the case of these colleges. The existence of the visitors proves the ecclesiastical origin of the colleges in the older universities.

In R. V. Catherine Hall, Cambridge a question arose as to whether the King could grant the inheritance of a visitation. Although this point was not definitely settled yet it was decided that the Crown could grant the power of visitation to any one it pleased for a time. And for this purpose no special form of words was indispensable. But it must be remembered that the King is bound to follow the founder's will as far as possible when appointing a visitor. Thus in the case of the Magdalen College it was decided that the King was bound by the general words of acts of parliament which tended to perform the will of a founder. It is no argument for controlling

acts of a visitor done in pursuance and execution of power given by founder that such power is unreasonable. "No usage which cannot be shown," said Lord Eldon (in 1. Jac. 20, 34) "to have a legal origin can even justify a breach of the statutes of a college." But it is seen from the cases of Queen's College Cambridge and Saint Catherines Hall, Cambridge that when the crown is the visitor as the ultimate heir of the founder it can grant a dispensation in particular cases with the statutes of colleges and may even grant a perpetual dispensation from the statutes, *e.g.*, at one time the president of Queen's College Cambridge a lay man by virtue of a dispensation although the statutes of the college required the head to be in holy orders.

A peculiarity of the college regarded as a corporation is that the officers are elected by a portion only of the whole collegiate body although according to common law the right of electing to the offices in a corporation is incident to the whole body of corporators and this has been confirmed by a statute (33 Hen. 8 c. 27.) that requires that in cases of all corporations the power of electing officers should be exercised by the whole body and not by a part only, yet the founders have been allowed to place the right of election in a portion of the whole body in direct contravention of this statutory rule. The fellows or the



master and fellows are the body in whose hands the right of election into the corporation is for the most part placed, although the college as a corporation consists of the master, the fellows and the scholars. The scholars have generally been excluded by the statutes of the colleges in matters of election.

Certain points particularly characteristic of colleges in English law may be shortly stated. But it must be borne in mind that these have no application in Indian law. The only utility derivable from their enumeration is that they supply us with a standard of comparison. They serve to show what the Indian colleges are not.

It is a settled rule that no minute accuracy is required with regard to the name of a college when it is making a grant or presentation to a church. All that is required is that the essential of the name should be so preserved in the grant as to raise no real doubt which college is intended. Thus where a demise was by the name of the Provost of Queen's College in the University of Oxford and of the fellows and scholars of the same college, the true name being the provost and scholars of Queen's Hall of Oxford it was held that these differences were immaterial because the true name could be found from the deed of foundation, the practice of the college as well as the royal confirmations of the charter of incorporation.

A college like other corporations does all juristic acts by its common seal. The master is bound to affix the seal to an act of the majority even though the latter decided to act against the specific intention of the master. But if it is shown that to affix the college seal is in any case within the discretion of the master he is not bound to follow the decision of the majority and can withhold the seal.

The power of admission to a college depends absolutely upon the will of the collegiate body, the public not possessing any right of entering themselves on the books of a college. But a college cannot add at its pleasure to the permanent body of its members. "A college which by its constitution is composed of a certain limited number of members, cannot, any more than any other corporation in such circumstances, make a permanent or even a temporary addition to the specified member of its members; thus if by the constitution or statutes of the founder the college is to consist of a certain body, as a master, so many fellows, and so many scholars, the college in general cannot add to such member in any of the branches; nor, strictly, can they diminish from the number, though the practice undoubtedly is not very rigid as to keeping each branch of the corporation always full of its proper number; and in fact one or more fellowships, or one or more scholarships, are

very frequently allowed to remain vacant for considerable periods of time. In general however when the college consists of a number of members defined and specified by the founder, no addition can be made to that member so as to put the new members exactly on the same footing with the old ones except by a new charter and a fresh incorporation." A question may be asked then as to how and with what limitation can a college add to its members when the statutes of the college do not specify the number. In *R. v. Master &c., of St. Catherine's College* (1. Jac. R. 381) this question was partially answered. It was held that a college was not bound to accept an increase to its foundation nor was it bound to accept any other trust but if it did accept such increase it would be compelled to adhere strictly to the terms of the trust defining the increase just like an ordinary private person." (1)

Even a founder cannot make an addition to his own foundation without a fresh grant from crown. Thus in the *A. G. v. Dulwich College* (4. Beav. 255) A being empowered by the crown founded and endowed a college and obtained letters patent incorporating a certain number and conveyed lands to them but after-

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(1) *A. G. v. Caius College Cambridge* 2. Keen 10. See Grant loc. cit p. 542.

wards made statutes whereby he added to the number of members and appropriated to them a portion of the revenues, it was held that A had no power of creating additional members or of declaring any trust of the property in their favour.

In this connection some points regarding college leases must be mentioned. In *Abney v. Miller* a testator devised two college leases by a will, after the making of which he renewed his leases but died before the college seal was set to one of the two new leases. It was held that as to the lease actually renewed there was a revocation of the demise, as to that which the testator had attempted only to renew, there was no revocation. You see that the principle which applies to the contracts which have not been duly perfected by the affixing of the corporate seal in the case of corporations generally operates with regard to the leases that have not been completed. Again in *Taylor v. Dulwich Hospital* a college seised in fee was restrained by its constitution from leasing otherwise than for 21 years and at a rack rent. A lease was made to X who entered and during the term greatly improved the premises by building. Of this circumstance an entry was made in the college audit book together with a recommendation, signed by the head and majority of the body to grant him a new lease at the end of the term at the same

rent and shortly before the end of the term an order was made by the college for such new lease. Lord Parker held that the recommendation and order not being under the college seal was not binding upon the college although it was signed by the majority of the members; and although if the tenant subsequently to the date of the order has invested capital on the premises in confidence and reliance upon the order, he would have been entitled in equity to compensation for the improvements, such compensation must have been made by the persons in their private capacity who signed the entry and not by the college, inasmuch as the intent of the proceeding was to wrong the college and violate the statutes and accordingly the tenant's bill to compel the college to grant a new lease on the above terms was dismissed with costs. Here again the fundamental principle of corporation law has been applied. I have drawn your attention to that principle while discussing the methods of passing byelaws. Where a majority takes upon it to do acts which it is beyond the competence of the corporation consistently with its constitution to adopt, the persons forming such majority are individually and in their private characters responsible for such acts, and cannot shield themselves behind the corporate powers and corporate responsibility which they have exceeded and violated.

In one respect the colleges formerly differed from other corporations at common law. This refers to trust funds administered by the colleges. At one time it was supposed that the colleges as fluctuating bodies could not be held responsible for the misapplication of trust funds by sometime members of the corporate bodies. Thus where a college had let lands under a very long lease and reserved rent, the college to pay the taxes, and it appears that the tenant had paid the taxes by mistake for a great number of years, without deducting them from the rent, Lord Macclesfield decreed that the taxes were to be deducted from the rent in future but refused to make an allowance backward and refused to direct an account because the College had lived upon their whole income and the sums were spent upon the repairs and other necessary demands of the College. Similarly in *A. G. v. Baliol College, Oxford* it was laid down "that the Colleges are a various fluctuating body and that the money is used and persons who so applied it are perhaps dead and consequently the successors in title ought not to be fixed with liability for the misdeeds of their predecessors" (9 Mod. 407). Again although where a college has by charter particular powers over a school, as of removing a master for misbehavior &c. although they were not appointed general visitors, equity would not interfere with their acts as regards

such powers ; yet “ in respect to the revenues, equity always interfered ; and the College having appointed one of their fellows master, and another usher, the latter of whom never resided and the former took both his own and the Usher’s salary Lord Chancellor Hardwick decreed the master to account for 15 years back for the benefit of the charity ; not of the Usher.” (A. G. v. Mayor &c. of Bedford 2 Ves 505). Of course for an equitable remedy the strict definition of a trust must be applicable to the provision concerned otherwise the remedy is through the visitor.

I think you have observed that a derogation from the general doctrine of Corporation law is noticeable here. A Corporation as I have repeatedly mentioned is characterised among other things by a successional continuity. The legal capacity is thought of as belonging to the entity and not to the component parts that form it consequently the rights and duties should be attributable to one continuous body. The successors in Corporate Office, if they are corporators themselves should accordingly be made liable for the misfeasance of their predecessors. But the cases already cited point to a different rule so far as maladministration of trusts by Colleges is concerned. In a later case, however, a doctrine more consistent with the general principles has been followed. There Lord Brougham observed “ it

is of no consequence, in cases of misappropriation of funds, that the individuals now sustaining the corporate character enjoying the immunities, and exercising the franchises of the Corporation, are wholly different from those who did the wrong or who permitted the neglect, and are only connected with them through the medium of a common municipal character; this is the condition inseparably connected with their corporate character, and the individuality of the body politic, with all its incidents, is thus maintained as perfectly in the system of jurisprudence, as the identity of the natural body is preserved entire in the system of the world." (*A. G. v. Mayor etc. of Norwich*). The bearing of this decision on the misapplication of trust funds by the municipal corporations is quite clear. The general rule regarding the identity of corporations has here been applied to municipalities. But how far this applies to colleges is still doubtful. In *A. G. v. Caius College Cambridge* (2 Keen, 150) it was decided that "the Court of Chancery cannot interfere with a trust which a testator has appointed to be in a college, upon any notion that there is more personal responsibility in individuals, and it will not appoint new trustees, although there have been great errors and misapplication of the charitable funds committed by the College for two centuries, no corrupt or improper motives having been imputed to



them." It appears from this that if there is no doubt about *mala fides*, the misdeeds of the college committed long ago may be visited on the present generation of corporators.

Legislation has brought the colleges more in line with other corporations. The statutory law need not detain us here. Most of the statutes refer to the collegiate property, tithes and advowsons which have no parallel in India. These are matters peculiar to English law and are of local rather than universal interest. Comparative jurisprudence must deal with them fully but as we are in the present course of lectures only indirectly concerned with that branch of legal science, a bare mention of the fact is sufficient.

It may be mentioned also that in English law the free grammar schools are important institution of eleemosynary nature. A famous statute (3 & 4 Vict. c. 77) has given the courts of equity large powers over these so-called public schools. The endowed schools as corporations bear some similarity to the colleges. Their constitution and administration are based on those of the colleges of the ancient English Universities. Various statutes have empowered the charitable scholastic institutions to hold and convey lands.

A peculiarity of schools as corporations is that "two persons only, the master and under-master, are frequently incorporated,"

contrary to the Roman maxim "tres faciunt collegia." There are several other points in the law of schools but as these would take us into many by-paths it is better to leave them with the remark that in modern law the statutes are creating educational corporations on the models of municipal ones. The old common law has been greatly modified by the modern statutory enactments in regard to the universities, colleges and schools. In fact the University of London that has been copied in India is a purely statutory corporation. The Indian Universities are likewise of the same class. Let us now turn to our own Universities. The law in this case is singularly simple. The constitution and legal capacity of the Universities in India have been definitely settled by the incorporating statutes. The solitary Indian decision regarding the position of the Universities has already been mentioned *viz.*, the Bombay University case which settled that the Indian Universities are like the eleemosynary corporations in England in several respects. They should be exempt from paying taxes on the property held for educational purposes. (The Bombay Municipality *v.* The University of Bombay.)

The law of the Universities in India has been modified of late by the recent Indian Universities Act (Act VIII, 1904). The educational corporation in the form of a University

was first called into existence in India by the Act II of 1857 whereby the University of Calcutta was incorporated. That Act defined the constitution and the powers, with regard to property, of the University of Calcutta. It made the then Governor-General (Viscount Canning) the first Chancellor of the University and laid down the rules regarding the exercise of powers by the Chancellor and the Vice-Chancellor so far as the proper management of the Corporation was concerned. The Corporation was to consist of the Chancellor, the Vice-Chancellor and the fellows. They should superintend the affairs of the University. The University, as then constituted, was mainly an examining body, although in course of time it became a federal body with the constituent colleges. The preamble in the Act of 1857 says that "it has been determined to establish an University at Calcutta for the purpose of ascertaining, by means of examination, the persons who have acquired proficiency in different branches of Literature, Science, and Art, and of rewarding them by Academical Degrees as evidence of their respective attainments, and marks of honour proportioned thereunto....." Consistently with this purpose the University was incorporated as an examining institution. Why this departure from the policy of the English Universities prevailed in India is a matter of history and it is beside our

object to enter into the details of discussions regarding the educational policy which is a political rather than a legal topic. However, the Calcutta University as established by the older Act together with the later ones—Bombay, Madras and Allahabad and the Punjab—retained its primary characteristic as an examining body till the newer Act modified it. According to the Act VIII, 1904 “the University shall be and shall be deemed to have been incorporated for the purpose (among others) of making provision for the instruction of students, with power to appoint University Professors and Lecturers, to hold and manage educational endowments, to erect, equip and maintain University libraries, laboratories and museums, to make regulations relating to the residence and conduct of students, and to do all acts, consistent with the Act of Incorporation and this Act, which tend to the promotion of study and research.” The University as contemplated here should henceforth be not only a teaching but also a supervising corporation. The complete metamorphosis has not yet taken place in all the Universities but a great step has already been taken by the Calcutta University towards the contemplated reform. And I must risk a digression to mention that the reconstruction of the Calcutta University on the new statutory basis is, as you all know, due to the unexampled activity of

one man in this country, the man who has been directly responsible for establishing the University Law College and indirectly the University College of Science. The University as a corporation now consists of (a) the Chancellor (b) in the case of the University of Calcutta, the Rector (c) the Vice-Chancellor (d) the ex-officio fellows and (e) the ordinary fellows. These corporators form the Senate and according to the present statute "all powers which are by the Act of Incorporation or by this Act conferred upon the Senate or upon the Chancellor, Vice-Chancellor and fellows in their corporate capacity or in the case of the University of Calcutta, upon the Chancellor, Rector, Vice-Chancellor and fellows in their corporate capacity, shall be vested in and exercised by, the Senate constituted under this Act and all duties and liabilities imposed upon the University by the Act of Incorporation shall be deemed to be imposed upon the body corporate as constituted under this Act." (Act VIII of 1904 § 4. (3)). The Senate then is the body having all the corporate powers and hence corporate liabilities. For the validity of legal acts the concurrence of the Senate is necessary and, as in the case of other statutory corporations, the common law rule has in certain respects been modified by the statutes, so it is not necessary for the validity of acts done by the University that the

Senate should be 'full' although according to general principles this ought to have been the rule. The Act definitely says that vacancy in the fellows' list should not impeach a corporate act (§ 4 (4)). As nothing to the contrary is mentioned the majority principle has no doubt a valid application here. In fact there is no other way of transacting business by a group-body.

The fellows are divided into (a) Ex-officio (b) ordinary. There are certain fellows called honorary but as they do not form a component part of the corporate group, they are not considered in connexion with the body corporate. The Ex-officio fellows are defined in the Act to be "the persons for the time being performing the duties of the offices mentioned in the list contained in the first schedule to this Act or added to the said list under sub-section (2)." The latter mentions "The Government may, by notification published in the Gazette of India or in the local official Gazette, as the case may be, make additions to or alterations in the list of offices contained in the said schedule." The ordinary fellows are (i) elected by the registered Graduates or by the Senate (ii) elected by the Faculties & (iii) nominated by the Chancellor. Their numbers differ in different Indian Universities. In order to retain office an ordinary fellow must attend at least one meeting of the Senate during the year other than a Convocation.

The fellows are assigned to several faculties by order of the Senate, the faculties are formed for the purpose of making rules and regulations regarding and for general supervision of, the different branches of study. Members of a faculty should consist of persons specially qualified for the subjects of study represented by the faculty.

As the Senate is a large body it is necessary that for executive work a smaller group should be selected. The Syndicate represents this smaller body. It is in fact an executive council with the Vice-Chancellor as the president. The Act says in § 15 (1). "The executive government of the University shall be vested in the Syndicate, which shall consist of (a) the Vice-Chancellor as chairman (b) the Director of Public Instruction for the province in which the head quarters of the University are situated; and in the case of the University of Allahabad, also the Director of Public Instruction in the Central Provinces; and (c) not less than seven or more than fifteen Ex-officio or Ordinary Fellows elected by the Senate or by the Faculties in such manner as may be provided by the regulations, to hold office for such period as may be prescribed by the regulations." It is required by the Act that the regulations just referred to should be "so framed as to secure that a number not falling short by more than one of a majority

of the elected members of the syndicate shall be Heads of, or Professors in, Colleges affiliated to the University." (The Indian Universities Act § 15 sub-section 2). In case of any doubt as to whether any person is or is not a professor as understood here the question is to be decided by the Senate.

The most important function of the Indian Universities even after the passing of the new Act is that of conferring degrees. The Act has made provisions regarding ordinary and honorary degrees. The ordinary degrees are generally conferred on the results of Examinations specially instituted for the purpose. As regards the honorary degrees the Act says in §. 17 (where the Vice-Chancellor and not less than two-thirds of the other members of the syndicate recommend that an honorary degree be conferred on any person on the ground that he is, in their opinion, by reason of eminent position and attainments, a fit and proper person to receive such a degree, and where their recommendation is supported by not less than two-thirds of the fellows present at a meeting of the Senate and is confirmed by the Chancellor, the Senate may confer on such person the honorary degree so recommended without requiring him to undergo any examination." As the University may confer degrees on fit and proper persons likewise it can cancel the degrees or the titles of honour



conferred or granted by the Senate when it is shown that the person holding the degree or the title has been convicted of what in the opinion of the Senate is a serious offence.

There are certain other provisions in the Act with regard to the affiliation and disaffiliation of colleges. The colleges in order that they might be regarded as adjuncts to the university should fulfil the conditions mentioned therein. It is not necessary for our purposes to detail them. The only point to be noticed in this connection is that, as already observed, the colleges in the Indian Universities are not corporations but merely amorphous associations. That is why the Indian law does not concern itself with the corporate nature of a college. As an association an Indian college is governed by the laws similar to those applicable to the unincorporate bodies in England. A college may very well be compared from the juristic standpoint to an educational shop. Therefore it is needless to repeat the common law rules applicable to an Indian college.

The regulations in the Indian Universities Act with regard to the procedure to be followed in holding any election of Ordinary Fellows, the appointment of the registrar and servants of the University and of professors and lecturers of the University and the miscellaneous provisions regarding the territorial exercise of powers

show clearly that as corporations Indian Universities differ in this important respect from their English prototypes that while the latter are perfectly independent of the Government the former are under a thorough control of the British Government. In other words the Indian Universities legally speaking are not independent corporations but are parts of the State machinery. The Governor-General in Council is by law competent to dictate terms to the Universities. They may be said to constitute the visitors of the Indian Universities. Whether the position of the Indian Universities would have been better under a different legal scheme is a question that does not touch our subject directly. But it must be observed that under the present Act a more definite control is given to a body outside the corporation and the effect is the creation of a novel type of an educational corporation which at present is doing admirable work.

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## LECTURE XII.

### Quasi-Corporations.

So long the group persons have occupied our attention. In this final lecture I should like to deal with the characteristics of persons that may have corporate powers, *sub modo* or for specific purposes. These are called quasi-corporations—a term frequent in America and adopted by Grant in his famous treatise on the law of corporations. These quasi-corporations may in their turn be classified under the heads aggregate and sole. The American lawyers however treat, for the most part, of quasi-corporations in connection with corporate powers exercised by bodies which have more or less an organisation designed for public service. Thus according to American law railroad companies engaged in the common carriage of passengers and goods are quasi public corporations. But in Indian as well as in English law these bodies are treated, as you know by now, as public business corporations. Sometimes however the public officers or public boards are regarded in America as quasi-corporations because they have the power to make contracts in reference to public affairs and are clothed with the capacity of succession and as such they have without an express grant of authority

the capacity to sue and be sued in regard to any matter in which, by law, they have rights to be enforced or are under obligations which they refuse to fulfil, *e.g.*, the trustees or overseers of the poor, of the levy court of a country, and of a board of country commissioners or supervisors, trustees of schools and town supervisors are quasi-corporations, so is the Governor of a state a quasi-corporation with regard to his office so that when, under a statute, bonds are made payable to him, he or his successor may sue thereon in his official capacity. (1) The Indian and the English law offer some similar examples in this respect. It is instructive to take up a comparative survey of both these systems so far as the present topic is concerned. I shall begin with some definite examples in order to find out the points of similarity or dissimilarity between the two systems mentioned. First as to the quasi-corporations aggregate in English law.

According to Grant "the most important of these bodies are Church-wardens, who though empowered to hold goods &c., in succession for the church have not power to hold lands in succession, have not a common seal and want other characteristics of complete incorporation"

(1) *Levy Court v. Woodward*. 2 Wall (U. S.) 501; *Trustees of Schools v. Tatman* 13. Ill. 27; *Jansen v. Ostrander* 1. Cow (N. Y.) 670; *Rouse v. Moore* 18 Johns (N. Y.) 407. *Governor v. Gridley* 1. Walk (Miss) 328.

(Grant p. 600). The Church-wardens are capable of holding money and goods to the use of the parish by gift or legacy and they may have an action for taking the goods whether in their own time or in that of their predecessors because their predecessors cannot commence an action as Church-wardens, after the expiration of their term of office for anything done or any cause of action which had arisen during that term. The reason for this rule is that the possession and custody of the goods of the church are only vested in them for the benefit of the parishioners, the property always remain in the parishioners.

Church-wardens, of themselves being unable to take or hold lands or other real property it was customary in common law for persons making grants of lands for the benefit of the poor of a parish to vest the property in feoffees to the use of the poor. Through the intervention of a trust something like perpetual succession was attained thus giving the feoffees a character somewhat similar to a corporation. But the statutory law gave the Church-wardens power to purchase or hire houses or deal with real property for the benefit of the poor. (9. Geo. I. Chap. VII §. 4 ; 45 Geo. III. Chap. 54 §. 1.). Through legislation therefore the Church-wardens became semi-incorporate while they retained their original character of trustees. In this respect the Indian law offers parallel

instances. The Mutwallis in Mohamedan law have the compound characteristics of corporations and trustees. They may be regarded for some purposes as quasi-corporations and for other purposes as trustees. Thus when persons liable to pay rent are Mutwallis it is essential that all the Mutwallis should be brought before the court as defendants inasmuch as Mutwallis stand here in the position of trustees. The case of *Abdul Rab Chaudhury v. Eggar* (35 Cal. p. 182) decided by the Calcutta High Court may be taken in illustration. This was a suit for arrears of rent. A owned a four-anna share of a Kharija taluk which he let out in putni to B. A subsequently sold this share to the plaintiffs and the plaintiffs in their turn made a gift of it to C and D. C afterwards made a transfer of a share in favour of E. Then C, D and E granted a putni potta in respect of the said four-anna share to the plaintiffs who by virtue of the potta became entitled to receive rent from the defendants who are in possession of the putni as Mutwallis under a wakf created by B. These Mutwallis refusing to pay rent the plaintiffs instituted a suit in the Munsiff's Court. The Munsiff dismissed the suit. The lower appellate Court held that the suit did not lie against one of the defendants who was a minor and not properly represented, but it did lie against the other defendant. Hence the appeal was preferred to the High Court.

Maclean C. J. held that the plaintiffs could not succeed because they had not brought before the Court all the parties who were liable to pay their rent. The rent was created by a putni potta. The interest under this putni potta subsequently became vested in the two first defendants as Mutwallis. "I have always regarded" observed the Chief Justice "a Mutwalli as a trustee. One of the Mutwallis is a minor; he is a defendant but no guardian ad litem has been appointed on his behalf for the purposes of this suit. It is found that summons was not properly served upon him; therefore as both Mutwallis are not before the Court the suit must fail." From this it appears that a Mutwalli has been regarded as a trustee at least when payment of rent is concerned. Whether he can always be regarded as a trustee is a different question; and it would be a rash statement to pronounce that a Mutwalli can never be a quasi-corporation sole or a body of Mutwallis a quasi-corporation aggregate. In fact the theory of Mohamedan wakfs would countenance the view that Mutwallis are like corporations in some respects at least and therefore properly speaking quasi-corporation aggregate.

Another instance of bodies figuring sometimes as quasi-corporations and sometimes as quasi-trustees is furnished by the Shebaitis of Hindu law. A Shebait is a manager of quasi-

trustee for the benefit of the idol and therefore has no power to alienate the hereditary office of Shebaitship by will. *Rajeswar Mullick v. Gopeswar Mullick* decided by the Calcutta High Court may be taken as an example (35. Cal. 226). Plaintiff sued for the construction of the will of his uncle Lalit Mohan Mullick under these circumstances. In the will it was provided that after the testator's death his widow Sudevimoni Dassi would perform the services of the family Thakur established by the testator's grand-mother Chitramoni Dassi and receive expenses for the purpose from the receiver as the testator had been doing and that she was to be succeeded in the Shebaitship by the plaintiff, plaintiff's son &c. On the death of Sudevimoni Dassi disputes and differences arose between the plaintiff and his brother and the nephew of the defendants in the suit as to the plaintiff's right under the will and as to whether Lalit Mohan had any power to devise his right and interest in the worship of the idol. The plaintiff contended that Lalit Mohan was entitled to deal with his turn of worship by will and custom of his family, as also of his caste and custom of the Hindus of Bengal. Defendants denied the existence of any custom of the family, of the caste or any custom of the Hindus of Bengal. They further contended that the clause in question in the will was invalid. Chitty J.



decided against the plaintiff and from that decision the plaintiff appealed. On appeal it was held by Maclean C. J. "there are cases and authorities for the proposition that a Shebait may by an act inter vivos alienate the Shebaitship. But these alienations are not regarded with much favour and special circumstances must exist to support them. The authorities which substantiate this proposition need not be referred. But all of them relate to alienations inter vivos and with one exception there is none for the proposition that a Shebait can by his will bequeathe the Shebaitship. On principle he cannot do so; for the question at once arises what has he to bequeathe or alienate under his will? A Shebait is a manager or a quasi-trustee for the benefit of the idol, his office endures only for his life; his will only comes into operation on his death. What is there then for him to alienate by his will? Nothing. In *Mancharam v. Pranshanker* (6 Bom. 298) the alienation no doubt was by will; but the learned judges seem to have proceeded on the view that because in certain cases there may be an alienation by a Shebait by an act inter vivos so equally there can be an alienation by a Shebait by his will. But the distinction is obvious. There is nothing to pass under the will but there is something which can pass by an alienation inter vivos viz., the then existing interest of the Shebait

There was then nothing which Lalitmohon could pass by his will so far as relates to the shebaitship. Any usage or established practice in the family has not been made to justify the alienation." So the Shebait is treated as a quasi-trustee, despite his character as a quasi-corporation, at least for the purpose of dispositive juristic acts. In a former lecture I have dwelt fully on the legal position of a shebait in Hindu law. You remember that sometimes a group of shebaits may figure as a unitary group and consequently as a semi-incorporate body. But it must be observed at the same time that the principle of perpetual succession—a fundamental characteristic of corporate bodies—does not obtain in the case of shebaits. They may therefore be treated sometimes as quasi-corporations and sometimes as quasi-trustees.

In English law the guardians of the poor of unions form quasi-corporations. By a statute the guardians are empowered to accept, take and hold for the benefit of the unions or the parishes "any buildings, lands, or heriditaments, goods, effects or other property and may use a common seal and they are further empowered by that name to bring actions, to prefer indictments, and to sue and be sued in virtue of their office." (4 & 5 will IV C. 76.) The characteristics of these bodies as marked out in the statute serve to place them in the

category of quasi-corporations. It is not necessary, however, for our purposes to deal with them more fully ; because on the one hand they do not exemplify any exceptional rules and on the other they do not offer a basis for generalisation. They are peculiarly English and have not been copied in the other systems. True they are connected with charity but the charitable endowments of the English law as well as the cognate religious endowments therein are not comparable to the charities and endowments in our law. Here it may be instructive to pause a little for a general survey of the characteristics of endowments in some of the improved judicial systems before taking up the subject of quasi-corporations sole.

The endowments are in general juridically divided into establishments and foundations. Gierke thinks that up to the reformation all foundations were dominated by the corporative system ; moreover the religious which were but a variety of association were governed by a rule they could not change freely. They had to get the permission either of the Holy See or of the Ordinary. They consequently approximated to the perpetual and immutable endowments. They had not the supple, floating, and incessantly varying character of the association. When one entered a congregation it was for life while an associate could retire from the association if he liked.

Moreover the congregation realises total absorption of the activity of its members, it implies a community of life and co-habitation under a common rule. The association on the other-hand requires a small part of the associate's activity. The congregation does not admit of any partition of property because it reserves nothing individual. In the association the individual life remains intact. The idea of an aim comes to the fore juridically in a congregation. Between a congregation united under a common rule in view of a common end and a foundation properly so called, constituted by its charge and served by a collectivity of managers or administrators the difference is almost imperceptible. Again a religious society or an hospital can be founded by a particular, a single individual making a donation, while an association needs a plurality of men. The religious congregation tended to be confused with a foundation and a foundation with the congregation that served it. There was a confusion of this nature till the laical influence freed the foundations from the religious congregations. Gierke would date this from the Reformation and Salcilles from an earlier period. There is no doubt in the Sixteenth Century truly laical establishments started. These had nothing to do with the religious congregations. It was so in Germany where the religious congregations were

disappearing since the Reformation, the same notion was prevailing in France and other Catholic countries, although in France the corporative idea was for sometime a little vague and uncertain. The charitable establishment of the ancient regime appeared as a representative of the grouped poor for whom the establishment existed and not the congregation serving the establishment. Here one may regard the anonymous group of the poor as the person in law. This kind of anonymous corporation is precisely one of the theoretical forms of the foundation and conceived under this point of view it is the idea of the foundation that prevails with regard to the indeterminate collectivity of beneficiaries. In Germany the doctrine disengaged itself much more radically from the corporative conception to be attached to the notion of a charge with an aim. This was the idea of a *stiftung*, its judicial construction was elaborated towards the end of the 18th century and it took a definite shape with the pandecitists of the 19th. Before taking up the two theories of foundation it is necessary to deal with a famous English case regarding the position of congregations in modern law. This is the famous Free Church of Scotland Appeal Case.

The Free Church dispute arose, according to Smith's summary, in this way. "In 1843 a large number of members of the Established

Church in Scotland, dissatisfied with the system of patronage then existing, seceded from the main body and called themselves The Free Church of Scotland. Both those who seceded and those who remained claimed equally to be the true Church of Scotland and each party believed that it was the duty of the civil power to support the true church as a State establishment. The secession of 1843 was of course not the first that had taken place, and there were at the time other independent Presbyterian bodies already existing in Scotland. Towards the end of the 19th century proposals were made for the union of the Free Church with one of these societies, then known as the United Presbyterians, who did not believe in the principle of State establishment. In 1892 a step was taken towards Union by a Declaratory Act of the Free Church Assembly which, it was alleged, modified the existing doctrine of the Free Church upon the authority of the Westminster Confession generally, and in particular upon the question of predestination, so as to make it more acceptable to the united Presbyterians. Finally, an Act for effecting a complete union was sanctioned in the Free Church Assembly on October 30, 1900 by a majority of 643 votes to 27. When this was passed the minority considering the whole proceedings to be *ultra vires* immediately withdrew, declaring that they and their

supporters were the true Free Church and as such entitled to its property. Whether or not this contention was well founded was the question for the Courts. In Scotland Lord Low the Lord Ordinary and the judges of the Inner House held that the change of position with regard to establishment was not a matter of fundamental principle and therefore large within the competence of the Assembly. In deciding this the Lord Justice Clerk, Lord Trayner and Lord Low all held that if it had been fundamental the act of union would have been *ultra vires*. But Lord Young went much further in conceding a wider power of legislation to the church remarking "I desire to say that there is, in my opinion, no rule of law to prevent a dissenting church from abandoning a religious doctrine or principle, however essential and fundamental, or from returning to it again with or without qualification or modification. Whether or not a property title is such that a forfeiture of property will follow such abandonment or return is another matter."

None of the judges in the Scottish Courts expressed any opinion upon the point about pre-destination. Upon appeal the judgment in favour of the United Free Church was reversed by a majority of the House of Lords.

This case is worth dwelling upon as illustrating the logical outcome of the street

contract-doctrine applied to associations, Hal-dane remarked in course of his speech "The case is a peculiar one in this respect that in the legal conception there is really not much difficulty.....the problem which is difficult is the conditions which give rise to its solution. Which of two perfectly well understood legal conceptions of the position of the church is adopted, depends on what view the tribunal before which the case comes, takes of matters of history and matters of doctrine.....We are agreed here that the question is one primarily of contract and secondly, of trust springing from that contract, and the question is what was the contract and what was the trust which they set up amongst themselves?....." In other words the difference between the two parties came to this—the appellant said that the original contract of union in 1843 did not permit the alteration of fundamental principles and that the Act of Assembly of 1900 was such an alteration. The respondents claim that any one joining the Free Church impliedly consented to accept the full legislative authority of the assembly over all ecclesiastical matters, including those of fundamental importance. If the Court were not willing to concede this they maintained that at any rate the alterations in question were not of this fundamental nature. The point to be specially noticed is that it was agreed on both sides that the actual members



of the majority were immaterial, and even if the dissentient minority had consisted of one individual only, that individual would have been equally well entitled to regard himself as the true Free Church and claim the control of all its property throughout the world. From this it appears that associations and congregations are treated by the English law as Quasi-Corporations. Although it must be observed that the law on this subject is in an unsatisfactory condition and until some statute lays down a clear principle the theory of Quasi-Corporations as applied to religious congregations might prove ultimately harsh and inconsequent.

Now as to the quasi-corporations sole. In English law the officers of the crown such as the Lord Chancellor the Lord High Treasurer and sometimes the Chief Justices are regarded as corporations sole for certain purposes. So early as the reign of Henry III, Philip Luvell the Lord Treasurer and his successors were created, by a grant of the guardianship of the Hospital of St. James in Westminster, corporation sole. But they were not corporations for objects other than those specified in the grant of Henry III. (Mad. Firm. Burg. 45.). Grant says that "the Chief Justices of the two benches are so far considered as quasi-corporations, that they might be prescribed in, as is the case with respect to real corporations.

Thus it may be pleaded by one who has a grant of an office from either, that the Chief Justices have been used from time whereof, &c., to grant the office.”(1) By a statute in the reign of Elizabeth, the clerk of the peace, for a country was invested with a quasi-corporate character. In American law as has already been mentioned the governor of states is a quasi-corporation sole.

The question may naturally be asked: Is the Governor-General in India a quasi-corporation sole? To answer this query the position of the Governor-General in Indian law should be properly understood. The legal capacity, the powers and functions of the Viceroy in India have been defined by statute. It is necessary to refer to the legislative enactment before drawing any conclusion with regard to the juridical position of the highest state functionary in India.

The first point to notice is that the Governor-General in India is not, juridically considered, separate from the Governor-General in Council in other words the English or the American analogy is not applicable to India. The question pertinent to our subject would then be what is the legal position of the Governor-General in Council in India? Although according to the statute sometimes the Governor-General in Council *e.g.*, in § 6. 24 &

(1) Grant *loc. cit.* p. 661. Year Book 19. Henry VI Fol. 8, pl. 17.

25 Vict. C. 67 it has been laid down "the Governor-General in Council may by order authorize the Governor-General alone to exercise, in his discretion all or any of the powers which might be exercised by the Governor-General in Council at ordinary meetings." But this power refers to the settlement of general questions and not to legislation. It is therefore more apposite to talk of the juridical personality of the Governor-General in Council.

Various statutes have settled the constitution of Governor-General's Council in India. The Council consists of the ordinary members and of the extraordinary members. The legal position of the body is somewhat peculiar. In some respects it has supreme powers in other respects it is under the Secretary of State in Council *e.g.*, the Governor-General in Council cannot declare war or enter into any treaty for making war against any prince or state in India without the express command of the Secretary of State in Council. The legislative power of the Governor-General-in Council extends to the making of laws and regulations for altering any laws in force in the "Indian territories under the dominion of the Crown. In cases of emergency the Governor-General can issue ordinances without his Council but these ordinances remain in force only for six months. From some of these characteristics one may be tempted to say that the Viceroy or

the Governor-General in Council is a corporation for certain purposes that is to say is a quasi-corporation. But when the test regarding property, contracts and liabilities is applied another group comes into view having authority over the Governor-General in Council and exercising corporate powers. This is the Secretary of State in Council. According to 21 & 22 Vict. C. 106 § 40 all property acquired in India vests in the Crown for the service of the Government of India, any assurance relating to real estate made by the authority of the Secretary of State in Council may be made under the hands and seals of 3 members of the Council of India. Again according to the same statute the Secretary of State in Council may, with the concurrence of a majority of votes at a meeting of the Council of India, make any contract for the purposes of the Government of India Act 1858. Any contract so made, if it is a contract which, if made between private persons, would be by law required to be under seal, may be made, varied or discharged under the hands and seals of two members of the Council of India. The benefit and liability of every contract made in pursuance of this Act passes to the Secretary of State in Council for the time being. The Governor-General in Council may execute assurances in India on behalf of and in the name of the Secretary of State in Council.

Therefore semi-incorporate powers are shared between the Secretary of State in Council and the Governor-General in Council and it is nearly hopeless to attempt at classifying these bodies according to the juridical tests of personality. It may be worth while to notice that the English law, rather illogically, refuses to call the Secretary of State a corporation sole even for official purposes although the Post-master General is recognised to be one. We may call these bodies approximately quasi-corporations.

Let us now turn to the theories of foundation that we left off in order to interpolate the examples just noticed of quasi-corporations in Indian law. The two theories may be broadly summarized by saying that the one regards the foundation as having a corporative substratum, the beneficiaries are the proprietorial representatives. And the other regards the foundation as a patrimonial charge with a determined aim.

If a foundation is regarded as an enlarged association the representative character proper to an association would subsist. If the board of a charitable establishment is regarded as a committee of a vast association of an indeterminate number of beneficiaries, the board must be regarded as managed according to the intention of the latter. These cannot meet together and frame the rules for management and election of administration as in a true

association of known members. Therefore it becomes necessary to entrust somebody with the duty of looking to the needs of the beneficiaries. This somebody is generally the functionary charged with the duty of watching over the general welfare of the country. It is the public administration, then, that has the highest control over the foundation. This is the practical result of the application of the theory of foundation derived from the corporative idea.

The second theory as already mentioned is connected with the conception of a proprietary charge having a definite aim. The foundation is regarded as a kind of modality of property—a form of property created by the intention of the founder, an intention designed to be perpetuated in a way. Sometimes it becomes necessary to vary some of the rules of such an establishment to meet the exigencies of time and it may be necessary to interpose an authority for looking to such demands. But the charges are carried out consistently with the primary intention of the founder. If the administrative authority intervenes it does as a guardian and does not mechanically interpret a presumed intention of an anonymous collectivity as in the corporative theory.

To these two different views correspond two distinct roles of public intervention. Thus the initial intervention according to the corporative

view is for authorizing the foundation when it appears that the conditions, under which it has been created, conform to the presumed intention of the eventual beneficiaries. The intervention of public authority replaces a general meeting of the associates. Again the realization of a foundation in private law (that is to say the process of creation and constitution) differs according to the views taken of its nature. Thus there are two modes of creation (1) direct (2) indirect. The latter although becoming common in India at the present day is agreeable to the French habit more than to the English and is nothing but an extension of charities *sub modo*. As an example of indirect creation of an establishment may be taken a hospital constituted by a testamentary direction. Suppose the founder wants to endow it with five lacs of rupees. In the legislative system that recognizes civil personality of a charitable establishment the endowment thus created may be divided into two operations. The first one is the charge given by the founder to an heir or an executor to erect a hospital as an establishment capable of receiving and being endowed with personality. The first act is then to erect the establishment. The next act is to pass the property intended for its endowment to it. Here difficulties may arise e.g. as in French law, in the case of transfer by executors (Salcilles loccit-Lect. 10) but

devices have been found out in other systems for obviating such difficulties. Thus in Indian law trusts are made to intervene when establishing endowed charity. These are to be regarded not as persons but as quasi-persons in other words the endowments in the Hindu and Mahamedan law like the endowments in Greek law are quasi-corporations. In the case of direct creation the testament or the declaration of intention to charge a particular fund is sufficient to constitute the latter into a person in private law. Of course certain conditions designed to make the intention manifest to third parties may be insisted upon by positive law e.g. declaration of intention together with an entry in the public register as in Switzerland or a declaration coupled with a formality of control like the administrative authorisation in Germany. But whatever may be the condition—publication or approval—it recognises and confirms a pre-existing foundation and does not create it. The creation of the foundation dates from the moment when the intention is manifested or made effective. All that is necessary for direct creation is to settle the plan and project and no further material work of establishment is necessary. This procedure, then, applies only to a patrimonial work of the kind that develops into a judicial person "with organised management.

The theories as sketched here may be applied with necessary modifications to Hindu



**Religious Endowments.** The endowed property as you know may be (1) Deva-Sthanam i.e. Property of a temple (2) Mattaw Property, the head being a corporation sole (3) Property held by a Mutt. A Mutt as has been observed in *Babajirao v. Laxmandas* (I. L. R. 28 Bom. 215) like an idol is capable of functioning as a juridical person in certain respects. But as you remember, no doubt, that the Calcutta High Court in a Full Bench decision has admitted the idol to be a juridical person in a restricted sense. The Mutt will likewise be a quasi-corporation and not a full one. As regards the property dedicated absolutely for the worship of a family God the same observations hold good. The personification is not complete and on applying the tests already elaborated in diverse contexts these species of endowment do not appear to be corporations in the full sense of the term. Here is a partial<sup>1</sup> creation of a *stiftung* and a manager is appointed with certain restricted juridical capacity. Thus in a Madras case (I. L. R. 27 Madras p. 472) it has been observed "According to Indian common law relating to Hindu religious institutions, the landed endowments thereof are inalienable. Though proper derivative tenures conformable to custom may be created with reference to such endowments, they cannot be transferred by way of permanent lease at a fixed rent, nor can they be sold or mortgaged."

Thus the juridical capacity is limited by severe restrictions and these institutions are simply the means of carrying out definite aims without the intervention of full juristic persons. An interesting parallel might have been quoted from the German law of foundations where the distinction between a *stiftung* and an *anstalt* shows how completely different legal systems have been compelled to adopt a similar machinery to meet the exigencies of circumstances. But that will take us too far away from our subject. It is more to the point to dwell a little on the connexion between trusts and corporations here, as in Indian law the trust conception has served in many instances where continental law has had recourse to juristic personality. I shall shortly tell you what Maitland has thought of the connexion between these two diametrically opposite conceptions.

The trust is a big affair. "This must be evident to anyone who knows—and who does not know?—that out in America the mightiest trading corporations that the world has ever seen are known by the name of 'Trusts.' And this is only the Trust's last exploit. Dr. Redlich is right when he speaks of it as an *allgemeine Rechts-institute* (all-common legal institution). It has all the generality, all the elasticity of contract." The power, the elasticity of Trusts is seen from the results brought about through its instrumentality. The quasi-corporations

afford familiar instances of such work. The religious congregations of the Scottish law, the Hindu and Mahomedan endowments in more instances than one exemplify the same. And many difficulties regarding abstract forms are easily solved through the conception of a trust. "In dealing with charitable trusts the courts have not been compelled to make any severe classification. Anstalt or Genossenschaft was not a dilemma which every trust had to face." But what about semi-incorporate bodies? No general classification can be given. All that the law of corporations tells us will not do. You remember the instances I have already mentioned. A trust-deed may be helpful here. "We must look at the trust-deed." We may find that as a matter of fact the trustees are little better than automata whose springs are controlled by the catholic bishop or by the central council of the Weslyans (say) or we may find that the trustees themselves have had wide discretionary powers. A certain amount of Zweck (aim) there must be, otherwise the trust would be 'charitable.' But this demand is satisfied by the fact that the building is to be used for public worship. If, however, we raise the question who shall preach here, what shall he preach, who shall appoint, who shall dismiss him, then we are face to face with almost every conceivable type of organisation from centralised and

absolute monarchy to decentralised democracy and the autonomy of the independent congregation. To say nothing of the catholics, it is well known that our Protestant Non-conformists have differed from each other much rather about church government than about theological dyna but all of them have found satisfaction for their various ideals of ecclesiastical polity under the shadow of our trusts."

This brings us to 'unincorporate bodies.' The village communities of Ancient India are such. The joint family in Hindu law is another. It may be of some consequence to state that the bodiliness which characterises a corporation or semi-bodiliness, if one may use the expression, that characterises as quasi-corporation cannot be predicated of even the Mitakshara family estate. The 'jointness' that is present is a sign of union rather than of unity. True sometimes the appellation corporation is loosely affixed to the Hindu family but that is only a product of vague generalisation. The point may be made clear by a simple example. If you find that a group is treated as consisting of separable units when it is trading it is a sure indication that the group is amorphous. It is unincorporate. Thus a member of a Mitakshara family acquires by birth a sort of interest in the joint family trade. This interest is comparable to that of a partner but it is not exactly a partnership because as it was pointed

out in *Latchmanen v. Siva* (26 Cal. 354) although a Hindu infant is entitled to an interest in the joint family trade by birth he does not thereby become a partner of the trading firm. The fact, however, that bears on our subject is that the members are treated as severally liable on account of the trade. The jointness allows of a division into distinct parts and the 'rechtsfahigkeit,' to use the word invented by Neubecker, appertains to the managing members as accredited agents of the family group. So the group must not be treated even as an incipient corporation, Sir Henry Maine notwithstanding. Co-ownership let us be reminded again is not corporate ownership perhaps it may be asked is not the joint family a form of a quasi-corporation? To this query it is difficult to give an unambiguous answer. Because on the one hand the quasi-corporation demands a kind of semi-bodiliness and on the other hand the 'body' is so accommodating as to make room within itself for many of the apparently unincorporate entities. A recent Bombay case may be taken in order to show the nature of the problem. In *Sakharam v. Devaji* (I. L. R. 23 Bomb. p. 372) it was laid down that when a debt is incurred by a Hindu as manager of the family for family purposes, 'the other members of the family, *though not parties to the suit*, will be bound by the decree passed against him in respect of the

debt; and if in execution of the decree any joint property is sold, *the interest of the whole family in such property will pass by the sale.*' Here we are in a dilemma. The jointness appears to be more than mere union of separate individuals into a whole. According to the view just quoted the absentee is equally bound with the consenting party. The corporateness is shadowed forth in this case. Must there be not, therefore, in the jointness a destinator who is a juristic person? I believe the answer will be the theory is to be modified by practice. I must not make bold, therefore to classify the Hindu joint family under a corporative or semi-corporative head.

It remains to say a word or two about the contractual and tortious liability of quasi-corporations. In *Amalgamated Society of Railway Servants v. Osborne* (1910, A. C. 87) the question of contractual capacity of such bodies was thoroughly gone into. Here an injunction was sought to restrain a trade union registered under the Act of 1876 from applying its funds to the payment of election expenses and the maintenance of Labour members in Parliament. The injunction was granted by the Court of Appeal and confirmed by the House of Lords. Various reasons were advanced for this, but the principle underlying the decision was that the trade unions came within the reasoning of the *Ashbury* case (1875, L. R.

7 H. L. 653) and were therefore limited in their activities to those objects which the enabling statute either expressly or impliedly allowed. Although the Trade Union Act 1913 has set at rest many of the difficulties raised by this decision yet the fact that a statute has been called forth by it requires some attention to the principle of this case. The question of fundamental importance is whether the principle of the Osborne case applies to those bodies which have retained their voluntary status by not accepting registration under the new Trade Union Act. In other words what is the position of quasi-corporations with regard to general contracts? The language of the judgments in the House of Lords is not quite consistent and leaves the matter in doubt. In the court of sessions, however, Lord Skerrington said "un-registered unions fall outside the principle of decision."

The question of tortious liability came to head in the famous Taff Vale Railway case. (1) An industrial dispute had arisen between the plaintiff company and their employes, and the defendant trade union (which was registered under the Act of 1876) intervened on behalf of the men. In the course of the dispute some tortious acts were committed by union officials acting within the scope of their employment

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(1) *Taff Vale Ry. Co. v. Amalgamated Society of Ry. servants* (1901) A. C. 426.

and Mr. Justice Farwell granted an injunction not only against the offending individuals but also against the trade union in its registered name. Upon appeal the name of the union was struck out of the action, the court of Appeal holding that there was no legal entity between a corporation and an individual which could be sued in a court of law. But upon final appeal the judgment of Farwell J. was restored, the House of Lords holding that the statutes which invested the unions with certain corporate privileges had thereby impliedly imposed the corresponding corporate liabilities.

This famous decision aroused a vigorous political controversy. Maitland remarked in an essay read to the Eranus club "of the Taff Vale case we are likely to hear a good deal for some time to come. The trade unions are not content: there will be agitation; perhaps there will be legislation." (1) This prophecy came true in 1906 when the Trade's Disputes Act (6 Edw. VII C. 47 §. 4) reversed the Taff Vale decision so far as trade unions were concerned. The House of Lords has in *Vacher v. London Society of Compositors* (1913. A. C. 107) held that the exempting section of the Act mentioned extends to all torts committed on behalf of a trade union, not merely to those committed in furtherance or contemplation of

(1) Maitland—Collected Papers Vol. III p. 271.



a trade dispute. The principle of the decision is not exhausted by the statute. The essence of the judgment is that corporate privileges and corporate responsibilities must always be co-ordinate unless parliament has decreed the contrary; *in so far as any body of men exercise powers analogous to those of corporations, so far do they incur the liabilities of corporations for the acts of those whom they employ.* Lord Macnaghten said "it cannot matter in the least whether persons acting in concert be combined together in a trade union or collected and united in any other form of association."

It has been remarked by a recent writer "this is of course a dictum not strictly called for by the bare requirements of the case in debate; but it is valuable as showing that Lord Macnaghten rested his judgment upon broader and firmer ground than the implied construction of the enabling statute. Up to the present time no other case seems to have arisen to give the courts the opportunity of applying the principle of the Taff Vale case to the circumstances of an ordinary voluntary society. In the absence of judicial authority reference may perhaps be made to the opinion of Sir Edward Clarke printed in the Times of March 6, 1912." On the authority of the Taff Vale case Sir Edward Clarke supposes that the property of the Women's Social and Political Union can be made liable in a representative

action for damage caused through the wanton acts of women belonging to the union and guided by it.

Two other earlier cases may be mentioned in this connection. In *Elkington v. London Association for the Protection of trade* (1911, 28 T. L. R. 117) an action was brought for libel against the association, the judgment was however given for the defendants on the ground that the publication in question was not libellous. The case shows that quasi-corporations may be sued like corporations for libel. Again in *Brown v. Lewis* (1896, a 12 T. L. R. 455) a representative action was brought against the committee of a foot ball club for negligence in erecting a stand, whereby the plaintiff was injured. In this case the County Court judge, however, amended the claim into one against the members of the committee personally and this was confirmed by a Divisional Court. But it is certain that after the *Taff Vale* case a different course will be followed in a like matter.

The position of a quasi-corporation when it sues as a plaintiff in a tortious action may advantageously be taken up now. As regards a corporation it has been an admitted doctrine from very early times that it is entitled to sue when any injury is shown to property or to rights of a proprietary nature (Y. B. 7. Henry VII. 9). When one turns to the semi-

incorporate or unincorporate bodies there appears very little authority to be guided by. In an old case—*Williams v. Beaumont* (1833. 10 Bing. 260.) the plaintiff was the chairman of an unincorporated assurance company, which was authorized to sue and be sued in the name of its chairman. In other words it was a quasi-corporation in the wide sense of the terms. The court held that under this power the chairman could maintain an action for a libel affecting the company in the conduct of its business. Again in a recent Scottish Case (*Brown v. Thompson & Co.* 1911 S. C. 359) a newspaper published an article alleging that the Roman Catholic authorities of Queen's Town had been guilty of religious persecution. Upon this the Roman Catholic bishop of Queens Town and the six principal clergy of the place raised an action, alleging that the libel referred to them. The Court of Session held the averments to be relevant and at the trial verdict and judgment were entered for the pursuers. Apart from such cases on particular torts there does not seem to be any clear authority settling the general question regarding the powers of quasi-corporations to sue for torts like corporate bodies.

Here I must stop. With the Taff Vale decision a new chapter has been added to jurisprudence. Common law, for a long time knew no *tertium quid* between a body corporate and

a body unincorporate. The trust governed association, it is true, held a place midway between the two, but, then, it was the 'trust-aspect' and not the 'person-aspect' that mattered there. But since the *Taff Vale* case the quasi-corporation has been clothed with a sort of personality—quasi-personality one might say. The evolution of this entity may fittingly be studied at the close of our course.

A trade union—the typically unincorporate body—must be our starting point. It is interesting as a connecting link between a corporation and a quasi-corporation. A man who found himself permitted to bring home to a corporation a tort, a libel, or an assault, found no similar permission accorded to him in proceedings against a trade union. "The law denied him a remedy against the union, declaring that there was no 'it' to sue; he must go seek the individuals and sue 'them.' He might not lay hands on the trade union funds. It is plain enough from the history of trade unions that the pioneers of these organisations were too acute to seek corporate form. Co-operation, not incorporation, was their aim. And so trade unionism became the magic wand which could create a body blessed with many privileges of corporateness; any attempt to punish the union dissipated the charm; at once the body vanished into thin air."

Parliament came to the help of these unincorporate bodies to protect them against the enemies within. The legislature gave "to an association of individuals which is neither corporation, nor partnership nor individual, a capacity for owning property and acting by agents" (Farwell J. in *Taff Vale case*). But before this intervention the trust was doing a great service in the English at least. A branch of law of trusts became a supplement for the law of corporations. It became a great factor in social development. It became "a most powerful instrument in social experimentation. To name some well known instances—It (in effect) enabled the land owner to devise his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint-stock companies with limited liability, until at length the legislature had to give way....." (Maitland—*The Unincorporate Body* L. C. P. 278). The trust has supplied in addition to these means a ready substitute for a law about personified institutions. Its achievements in this respect seem to have eclipsed all others in social and juridical importance. A comparison of English law or its derivative of Indian law with the continental system will

at once make this point clear. Where the Germanic Law has asked for a personified anstalt or stiftung, the English system has been satisfied with an active trust. The Inns of Court, the Stock Exchange, the Jockey Club, the Marylebone Cricket Club are witnesses to the success of the trust system in matters of 'corporateness.' A club, even now, is only an unincorporated body. But a club is "possessed of property (such as a freehold or leasehold house, furniture, books and pictures, the money at the bank) which is vested in trustees upon trust to permit the members for the time being to have the personal use and enjoyment of the club-house and effects in and about it." (per Stirling J. in *Baird v. Wells* 44 Ch. D. p 674). The members of a club are equitable joint tenants of its property.

Besides the trust an uncertain help came from another quarter that tended to bridge the gulf between corporate and non-corporate bodies. This was Equity. Through the help of equity a kind of corporate representation was secured for the unincorporate bodies. Sometimes a few of the members of an association were allowed to sue and be sued on behalf of themselves and all others having the same interest, in order to prevent a failure of 'Justice.' (1) But this treatment by equity was

(1) *Commissioners of Sewers v. Grady*, 3 Ch. D. 615.

uncertain. As was pertinently remarked by Lord Chancellor "the absolute duty of Courts of Justice is not to permit persons, not incorporated, to affect to treat themselves as a corporation upon record." (1)

While in England the unincorporated bodies were helping to bring about a new adjustment of ideas, America was, at the same time recognising the fundamental fact that groups of men necessarily tend to display corporate characteristics. Gilfillan, C. J. remarked in *Fannegan v. Noerenberg* (52, Minnesota, 239, quoted by Prof. Jeremi Smith, *Cases On The Private Corporations* I p. 150). "An association may be so far a corporation that for reasons of public policy, no one but the State will be permitted to call in question the lawfulness of its organisation. Such is what is termed a corporation *de facto*—that is, a corporation from the fact of its acting as such, though not in law or of right a corporation.

As to all the world except the paramount authority under which it acts, and from which it receives its charter, it occupies the same position as though in all respects valid; and even against the State, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious." The *de facto* corporation, the quasi corporation is not a mere phantom. The

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(1) *Lloyd v. Loaring*, 6 Ves. p. 776.

political, the social as well as legal considerations require that its existence should be recognised, certain wrongs are to be redressed, certain evils are to be checked. The unscrupulous manipulation of markets by associations may lead to a great disturbance of social economy and hence the necessity for a Taff Vale decision. When the rationale of the decision of that famous case was questioned in the House of Commons, the Attorney-General gave his opinion as follows. "The reason why trade unions were made liable for wrongs done by their authority might be understood by reference to the case in the House of Lords of *Quinn v. Leatham*. As long as the right of action for wrong was confined to a right of action against an individual, it was absolutely useless to any one. The plaintiff found in many cases that he was suing a man of straw; grievous the wrong, however substantial the damages to which he was entitled, he would not get any fruits whatever of his judgment. But as soon as it was established that the body which had really authorised those acts was liable a real remedy was given to the man who had been wronged." That is to say, that the law offers to the person wronged the best type of remedy possible whoever may be the wrongdoer a single individual or a group of individuals. The Taff Vale decision, then, consistently with the needs of times, has



brought into being the quasi-corporations. It has filled up the gap between a wholly corporate and a wholly unincorporate body. There cannot be any better illustration of modification of theory by practice. "The courts in theory recognise the legal personality of individuals and of corporations but not of any non-corporate group of individuals. In practice non-corporate groups—such as the firm, the club and the trade union—are now being treated as persons to such an extent that the border line between the individual and the corporation is becoming blurred and uncertain." So the distinction between corporate and non-corporate bodies is, in practice, vanishing by degrees.

One word and I shall have done with my subject. I have purposely made these lectures non-technical. My object has been to point out to you the rhythm of juristic march. The view point has been mainly historical and comparative because that is the only view point which enables one to take a comprehensive survey of the juridical doctrines underlying the law of corporations. A mere catalogue of decided cases would have been as good as useless for my purpose. To repeat my object has been to deal with the principles and not the details of corporation law. I believe I have shown you to some extent how the principles have been modified

through the agency of opinion reflecting the changing needs of society. Law and opinion are so related that the course of one determines that of the other. So a lecturer who values jurisprudence no less than the practical administration of law is bound to lay stress on the comparative side of his studies. For the systematic study of principles must take into account the modifying factors of jurisprudence—opinion and sentiment. What otherwise appears to be an intruding, inconsequent rule with the co-operation of history finds its true habitation. Life of law as has been well remarked by a great jurist is not logic but experience. This all important factor again is made up of opinion and sentiment, and deeper than opinion lies the spring of sentiment. The doctrine of corporations studied in this light shows that law is not a museum of art it is a representation of life.

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